MISSISSIPPI LAW JOURNAL

SPECIAL ISSUE

THE JURISPRUDENCE OF LIBERTY

Charles Frankel

THE MEMORIAL LECTURE SERIES—1975

TO MEMBERS OF MISSISSIPPI STATE BAR

We are pleased to have the opportunity of having a part in the publishing of a lecture series by Charles Frankel, Old Dominion Professor of Philosophy and Public Affairs at Columbia University. We feel that the subject matter is timely and important, and we hope that this volume will enhance your library.

We wish to commend the law firm of Butler, Snow, O'Mara, Stevens & Cannada for making the lecture series possible.

We appreciate our many friends of the Mississippi Bar and extend an invitation to you whenever you are in Jackson to come by and see us.

Yours sincerely,

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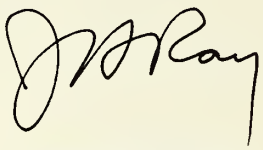
The Mississippi State Bar is grateful to the law firm of Butler, Snow, O'Mara, Stevens and Cannada for its grant to the University Law Center which has made possible an annual memorial lecture series. The 1975 lectures were delivered by Professor Charles Frankel, a distinguished philosopher, and they are presented in this special issue.

The State Bar also commends Mississippi Valley Title Insurance Company for its generous contribution which has made possible the publication of this special issue of the Mississippi Law Journal as a public service to the lawyers of Mississippi.



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THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW MEMORIAL LECTURES

In 1973, the Jackson law firm of Butler, Snow, O'Mara, Stevens & Cannada established the School of Law Memorial Lectures in memory of its founding partners, George H. Butler, Sr., Charles B. Snow, and J. Morgan Stevens. As specified in the granting document, the purpose of the Lectures is to "provide substantial educational enrichment opportunities for the students and faculty of the Law School, and such members of the bench, bar and academic community as may appropriately be included."

The theme for the lectures is "The Role of the Law in the Remainder of the Twentieth Century." The lectures each year will exploit this general theme and, through the vehicle of the lecturer's particular subject matter, will explore the influence of law—both potential and actualized—on our civilization.

For the initial lectures last year, we were honored to have Professor Philip Kurland of the University of Chicago Law School. His presentation, entitled "Watergate, Impeachment, and the Constitution," made a significant contribution to the continuing examination and refinement of the separation of powers doctrine. Phil Kurland established a worthy standard for this series. Our lecturer this year is cut from the same mold. Dr. Charles Frankel is a man of enormous intellectual skills whose writings, teachings, and personality have exercised a significant influence on the shaping of American thought and culture; and in a broader sense, on the form in which our culture is made visible to other peoples throughout the world.

Currently, Dr. Frankel is Old Dominion Professor of Philosophy and Public Affairs at Columbia University, teaching in the faculty of Philosophy and in the School of Law. If it is necessary to characterize the man, then we should say that he is a philosopher—but not merely a philosopher. In another age and another place, he would very likely have fulfilled the Platonic ideal of Philosopher-King. Our concept of democracy has, perhaps fortunately, foreclosed his aspirations to this role. But this reluctance on the part of our society to embrace the Platonic scheme should not cause us to relegate Dr. Frankel to the boneyard of pure philosophy. For, if not a philosopher-king, he is, in the best sense of the term, a philosopher-activist.

Few men in history have succeeded in achieving such a rare and treasured balance between the practical and the theoretical. As the practical man, he served with distinction as a naval officer in the Pacific and in Japan during World War II. His sense of civic responsibility is keenly refined and has impelled him to continuing participation in gov-

ernmental and community affairs. He is a member of the Fleishmann Commission which is studying the quality, cost, and financing of education in the State of New York, he is a former Chairman of the American Assembly for Advancing the Teaching of the Bill of Rights, and a former Chairman of the Committee on Professional Ethics of the American Association of University Professors. At present, he is Chairman of the International Council on the Future of the University, and Chairman of the Intellectual Interchange Committee of the Japan Society.

Additionally, he has served with distinction as Assistant Secretary of State for Educational and Cultural Affairs, as Chairman of the International Committee to Examine French Education, and as chairman of a similar committee to examine British educational planning.

On the philosophical side of the balance scale, his output has been truly astounding, both in its quantity and in the diversity and excellence of his writings and thought. His books include: *The Faith of Reason, The Case for Modern Man, Issues in University Education, The Democratic Prospect, The Love of Anxiety and Other Essays, Education and the Barricades, High on Foggy Bottom, The Pleasures of Philosophy,* and a recent novel entitled *A Stubborn Case*. These writings, and his numerous articles in periodicals and scholarly journals, enable us to understand something of the genius of the man. In reviewing his writings, I was particularly struck by his sense of prescience—that rare gift of foreknowledge which enables one to recognize the developing trends in a society. This sense was most pronounced in an essay he published in 1962 entitled "Politics and Ethics," in which he identified the essential failings in our political system—failings which would make possible the Watergate scandal a decade later.

"The failure of politics in our time," he wrote in this essay, "is told in the conversion . . . of simple virtues like honesty, fellow-feeling, and loyalty to one's friends into Quixotic fancies by which it is difficult even for decent men to live."[1]

The broad diversity of his skills is also evident in these writings, which range from the scholarly philosophical exposition found in *The Faith of Reason,* to the quaint truths of an entertaining little fable entitled "The Bear and the Beaver." The latter teaches a simple lesson—and one which should be apparent—that there are other virtues in life than the work ethic.

His concept of philosophy as a tool for the enrichment of the individual life is perhaps best explained in his introduction to *The Golden Age of American Philosophy*. He said there that: "[Philosophy] is an instrument by which men, through learning to examine the alternatives

[1] Frankel, *Politics and Ethics,* in ETHICAL PROBLEMS FOR THE SIXTIES 25 (1962).

to their own beliefs and values, learn to know what they believe and what they value, and why."[2]

His principal contribution to our time will perhaps be remembered as his ability to make us aware of ourselves—of our limitations and of our possibilities.

I am convinced that, if civilization means growth in self-awareness, then Charles Frankel has helped make America a more civilized society.

Dean Parham H. Williams, Jr.
University of Mississippi School of Law

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[2] C. FRANKEL, THE GOLDEN AGE OF AMERICAN PHILOSOPHY 16 (1960).

THE JURISPRUDENCE OF LIBERTY

Charles Frankel

Introduction

My distinguished predecessor as Memorial Lecturer, Professor Kurland, ended his lectures last year by observing that "[t]oday we are suffering not only from a corruption of the Constitution through perversion of the institutions of government, but also from a corruption of the Constitution because the men we have chosen for high office are unworthy."* Over the course of four decades power and authority have moved steadily to the executive office of the Presidency. It is a movement that perverts the essential spirit of the Constitution, Professor Kurland pointed out, and duplicates the very evil against which the American colonists originally revolted when they condemned the British King and the cabal around him for subverting the traditional liberties of Englishmen.

Professor Kurland was wise enough to stop where I have the foolhardiness to begin. Why this movement towards the concentration of power in a President and his personal advisers, shielded from scrutiny by the Congress and operating outside the restraints of Executive Departments? And why, in a nation of 200 million people, a reasonable number of whom are competent and public-spirited, are the pickings so often dispiritingly slim in the contests for high public office? There are many reasons, each of which would take a good deal of time to explore. But there is also, I cannot help but think, one enveloping reason. It is an attitude compounded of indifference, impatience, and skepticism with regard to a central principle on which our system is based—liberty.

Can we afford the diffusion of power, the opportunities to check, delay and veto, the long periods of drift and indecision and the sudden spurts of impulsive action, which appear to mark our political life and legal processes? I hope you will agree with me that this question is being asked, and that it bespeaks a frame of mind that exists in public life and in large sections of the citizenry at large. It is a frame of mind which helps explain why power has moved to the center and why men and women of good will so often choose other paths to useful accomplishment than public service. We need, I think, to review the soundness and indeed the very meaning of the idea of liberty. We need to get back to

* Kurland, *Watergate, Impeachment, and the Constitution*, 45 Miss. L.J. 531, 599 (1974).

the sources of our political and legal being, to examine them, and, as it were, to renegotiate the terms on which we are prepared to live with them.

It is in that spirit that I have written the essays that follow. They represent, of course, only a start towards such a reappraisal of the fundamentals of our civic lives. I hope that, over and above any light they may cast on the subject of liberty, they will also serve to invite your attention to issues which, though they may seem to be remote from the daily practice of law, give that practice its true dignity and significance. As Holmes said,

> The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.**

I. Two Perspectives on Liberty

"It is one of the finest problems in legislation, and what has often engaged my thoughts whilst I followed that profession," wrote Edmund Burke in 1795, "what the State ought to take upon itself to direct by the public wisdom, and what it ought to leave, with as little interference as possible, to individual discretion." To this he added immediately, "Nothing, certainly can be laid down on the subject that will not admit to exceptions, many permanent, some occasional."[1] I am of Burke's mind. The subject is not one that lends itself to answer by sweeping formula. But it is the threshold question in any discussion of liberty.

Why do we treat some matters as proper fields for legislation and coercion while we treat others as unsuitable for such regulation? All that is clear is that different ages draw the line between what is appropriate for compulsion and what is not with astonishing variability. One age says that governmentally imposed limits on the right of corporations to contract with individual workers is an infringement of basic principles of liberty, but that firing university teachers for espousing unsound ideas about the gold standard is a legitimate act of self-defense. Another treats the rights of professors as inviolate but looks upon the regulation of corporations as part of the progress of mankind toward true liberty. What they share in common is only the conviction that wherever they think that the line should be drawn is the one natural and rational place to draw it.

** O.W. Holmes, *The Path of the Law*, in Collected Legal Papers 202 (1920).

[1] E. Burke, *Thoughts on Scarcity*, in 5 Works of Edmund Burke 107 (1894).

John Stuart Mill's words, written in 1859, still describe the situation:

> All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed—by law in the first place, and by opinion on many things which are not fit subjects for the operation of law. What these rules should be is the principal question in human affairs; but if we except a few of the most obvious cases, it is one of those which least progress has been made in resolving. No two ages, and scarcely any two countries, have decided it alike; and the decision of one age or country is a wonder to another. Yet the people of any given age and country no more suspect any difficulty in it than if it were a subject on which mankind had always been agreed. The rules which obtain among themselves appear to them self-evident and self-justifying.[2]

Can we set forth in some defensible fashion the principles that lead us to say—and usually to say with such passion and certainty—that it is right for the law to protect us from cyclamates but wrong for it to protect us from whiskey, right for it to force us to send our children to school but wrong for it to tell us what we may teach them about God, right for it to prohibit us from actions that make the environment ugly but wrong for it to tell us to keep our hair neat? If it is right to stop industrial plants from contaminating the air, why is it impermissible to tell television networks to cease polluting the airwaves with exercises in sadomasochism? If it is correct to assert that American citizens have fundamental rights to live their private lives as they please, why is it also right, as none other than Justice Douglas has held,[3] that a village can keep a group of unmarried college students of assorted sexes from occupying a residence within its borders? Are there consistent principles which lie behind such judgments? And do these principles, if we can find them, represent merely our preferences turned pretentious, simply the projections of the habits of mind we have developed because we were born where we were and live where we do? Or do they state rules of reason not wholly anchored in personal idiosyncrasy or the idioms of our place and time?

To explore these questions, and the questions to which they lead,

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[2] J. MILL, ON LIBERTY 8 (C. Shields 1956).

[3] Village of Belle Terre v. Boraas, 416 U.S. 1 (1973). Justice Douglas found that:

> The regimes of boarding houses, fraternity houses, and the like present urban problems. . . . A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.

Id. at 9.

is to examine the jurisprudence of liberty. In three essays, obviously, I can deal only with a few aspects of the intricate issues they raise. But I hope I shall be able to say enough to indicate where I think their center lies.

Let us begin with some observations not so much about liberty itself as about profitable and unprofitable ways to think about it. There is a feature of liberty frequently overlooked not only by people fighting in the trenches, but by lawyers, philosophers, and moralists. The liberties that we commonly fight for, the liberties that we have thought significant enough to seek to protect by specific laws, are equally well described as restraints. The freedom of the press is a restraint on what government officials can do about or to television commentators. Religious freedom is a restraint on what a particular religious or irreligious majority may legislate. The freedom of workers to combine is the unfreedom of employers to discharge people for union activities. To guarantee a liberty is to create an unliberty. It is to tell some people that they have a choice and others that they do not. It is to make a distinction between liberties. It is to say that some are more important than others.

Thus, it is no help, so far as I can see, to suggest that we can make our decisions about what should and should not be permitted in society by determining what will contribute to the greatest amount of liberty. In a society in which 90 percent of the population passionately hated Protestants and wished to deny them the right to maintain their churches and schools, a constitutional guarantee of religious freedom for Protestants would mean a restraint on the overwhelming majority of the population. If we insist, nevertheless, that such a freedom for dissenting religions is basic, and that the small minority is to be protected against the vast majority, it cannot be because, in any simple sense, we want more liberty rather than less. If we use the quantitative language of addition and subtraction, it is a Pickwickian language. We are talking about quality not quantity.

And the quality is not in the liberty itself but in what it is a liberty to do or omit. There is no common quality intrinsic to all liberties which permits us to say that one liberty contains more of the precious elixir than another. To have a liberty is to be in a position where, with respect to doing some particular thing, no other individual or individuals prevent or compel us. But this does not allow us to say that we have more liberty when we choose our religion than when we choose our wine, or less liberty when we have to wear seatbelts than when we have to observe the law of libel. To speak of "more" or "less" is to speak of the *content* of the liberties in question, and to compare them by some external scale of values. If we say that the toleration of different religious beliefs is closer to the heart of liberty than the freedom to act on the religious conviction that a religion we deem blasphemous should be

suppressed, this is because we assert that the uncoerced religious conscience is to be valued even over the claim of true belief. This cannot be defended on the basis simply of an abstract belief in liberty.

This is one reason why I am not persuaded by the classic social-contract theory,[4] recently revived, which holds that apart from any particular historical, moral, or legal context, all individuals are prima facie entitled to liberty. The restatement of this theory has received considerable attention from philosophers, lawyers, economists, and others.[5] It has been called a restatement of bourgeois liberal philosophy by some[6] and an explication of the basic principles of British socialism by others.[7] Whatever it may be, it appears to make the assumption—to me a most puzzling one—that "liberty" stands for some condition about which it is meaningful to say that, considered in and for itself, the more we have of it the better off we are.[8] It may seem that being restrained or coerced is obviously more disagreeable than doing things by our own free choice, but if we make this assumption we will be wrong. The behavior of large numbers of people has regularly refuted it. When offered liberty they have begged for miracle, mystery, and authority. Nor does each of us invariably prefer liberty to compulsion. Would we not sometimes prefer to be restrained by friends in a warm room with a bottle of wine before us than to exercise the liberty to get up and wander outside in the cold and dark? If one attaches a special value even to such a liberty it is because one holds a certain view of how people should live and what

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[4] J. RAWLS, A THEORY OF JUSTICE (1971), is the central book in this revival. *See also* R. NOZICK, ANARCHY, STATE AND UTOPIA (1974).

[5] Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500, 533 (1973). Dworkin observes that:

> The critics conclude that the fundamental assumptions of Rawls' theory must, therefore, be the assumptions of classical liberalism, however they define these, and that the original position, which appears to animate the theory, must somehow be an embodiment of these assumptions. . . .
>
> . . . But the critics of liberalism now have the responsibility to show that they are wrong. They cannot say that Rawls' basic assumptions and attitudes are too far from their own to allow a confrontation.

[6] C. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL 87-94 (1973).

[7] Hampshire, *Book Review*, THE NEW YORK REVIEW OF BOOKS, Feb. 24, 1972, at 34. Hampshire concludes that:

> This is certainly the model of social justice that has governed the advocacy of R.H. Tawney and Richard Titmuss and that holds the Labour Party together. Society must repair the cruelties of nature, and it exists not only to preserve law and order but also to correct the natural differentials between the strong and the weak, and to give institutional support to self-respect, which is for Rawls a primary value.

Id. at 37.

[8] For a criticism of Rawls' theory of liberty from this point of view, see Hart, *Rawls on Liberty and its Priority*, 40 U. CHI. L. REV. 534 (1973).

sorts of character they should aim at forming in themselves. The special value one places on liberty is part of a larger moral design.

These remarks, I am aware, put aside an important and sophisticatedly argued thesis with a swiftness bordering on dogmatism. But I hope that I have said enough at least to suggest that I have chosen the special path into the discussion of liberty that I am going to take not by blind impulse but by considered preference, obdurately wrong though it may be. If I am right, it is not possible to say why Liberty with a capital L is to be valued, or what particular liberties are to be grouped together under that eulogistic label, without relying implicitly on some picture of what counts in the scheme of human excellence—without some notion, in the common expression, of what life is all about.

Accordingly, if we are to think seriously about liberty, I suggest it is best to start by placing it within a larger frame of ideas, inclinations, and moral convictions. Definitions and detailed analyses of this or that aspect of the concept of liberty must come in due time. But we ought to look at the forest before we get to the trees. The forest is the dense and largely untracked network of mental and emotional paths that we ourselves follow when we think about liberty or make decisions about it. Our inarticulate habits, sentiments, anxieties, and hopes influence what we look for when we are in search of liberty, and color what we accept as a reasonable set of conclusions. Our purpose today, is propaedeutic—to see if we can make ourselves more aware of, and perhaps more in control of, this environing network of ideas and attitudes within which our concepts of liberty take their shape. We come to these concepts, I think, as part of a general perspective on human experience and possibility—as part of a compound of fears and aspirations, of basic entanglements and attachments, and of beliefs about the determinative factors in human life, which are only half known to ourselves but which compose the stuff out of which we build our social ideas.

I say "perspective." I mean more or less what is ordinarily meant—a view of a subject which assigns to its parts certain proportions in relation to one another, which puts some things front and center, assigns other things to a remoter background, and leaves still other things, which might figure largely in a different perspective, entirely out of the picture. Most of the commanding philosophical systems that have been produced—Plato's, Aristotle's, Spinoza's, Kant's—have offered perspectives in this sense. In elucidating such perspectives we come to see that the meaning and rationale of some particular idea we hold—say, about liberty—depends on its shape and fit in relation to other ideas, and that it would have a different meaning and rationale if we shifted our point of view. William James said that the purpose of philosophy was to break the mind free from its encrusted habits and to awaken it to the possibility of thinking otherwise. It is characteristic of some

philosophies that they turn the mind around on its moorings so that it sees an entire landscape differently. This operation of turning our minds around on their moorings is what I propose that we join together in trying to do.

I would ask you to consider liberty as it looks within the perspectives of two 17th-century thinkers, Thomas Hobbes and John Locke, who give expression, if I am not mistaken, to fundamental and enduring beliefs and attitudes by which most of us in the Anglo-American legal tradition still live and between which we are still torn. But they express these ideas and emotional dispositions more openly and less impulsively than we ourselves normally do, and connect them to explicit ideas about the basic and perennial characteristics of human nature and political systems. They thus help us to discover our own basic beliefs and controlling tropisms and aversions. Had I time I would also ask you to consider with me two other perspectives with which we ought also to square our accounts. One is associated with Edmund Burke, the other with Hegel and Marx. But Hobbes and Locke, particularly the latter, have provided the commanding perspectives in the American tradition, and we can make an adequate start in getting our ideas under control by coming to terms with their positions.

Obviously, I make no pretense to giving a thorough account of their views. My purpose, indeed, is not quite to reproduce their ideas—for like other men they were sometimes inconsistent and sometimes equivocal—but to extract that distilled essence of their points of view which may explain why their influence has been so profound, why their systems still seem plausible, and why, faced by our own problems, we keep returning, often without knowing it, to the fundamental ideas of one or the other of them. What I offer is a conscious idealization of the systems of Hobbes and Locke, but I trust not a disfigurement. It is the form in which, to my mind, their perspectives serve best to bring our own assumptions about liberty to the surface.

A. Thomas Hobbes

1. Hobbes' Perspective

To speak of a "system" is to speak almost automatically of Hobbes. No one writing on law and politics has ever been more clearly of a mind to define his basic terms, put his basic premises on the line, and deduce the consequences unswervingly. Hobbes was not of course immune to the considerations of practical politics and local circumstance that have influenced other jurisprudential thinkers. Although he was an abstract reasoner, not a man of action, he thought of reason as basically an instrument of practical utility: "The end of knowledge is power," he

said.[9] He thought that his views on politics and law followed deductively from his theory of human nature, and this, in turn, from his general theory of the behavior of bodies in the universe. (He was a thoroughgoing materialist and believed that nothing but bodies existed.) Nevertheless, in response to the crises of his time he set forth his beliefs, not in their due logical sequence, but in the order of their political urgency. *De Cive*, his political-legal treatise, which was Part III of his *Elementa Philosophiae*, appeared in 1642. *De Corpore*, Part I, appeared in 1655. *De Homine*, Part II, which contains the nub of his argument, appeared last, in 1658. But as Hobbes knew, although each part of his philosophy was linked to the others, the political-legal part was perfectly intelligible on its own. He believed it could be judged in the light of common experience and without going back to the ultimate axioms of natural philosophy to which it was logically connected.[10] In this belief he was surely right.

Yet if Hobbes thought that common experience justified his views and that each individual would recognize their truth if he examined his own mind and his own encounters with the world, his appeal to experience was nevertheless not that of the empiricist who goes about observing, classifying, and amassing factual evidence. It was the appeal to experience of a systematist, a builder of analytic models, concerned to offer a stripped-down framework of concepts whose purpose was to allow men to understand their political experience and to build their political institutions by moving in logical progression from one idea to another. To the objection—it is still with us—that his theories of human psychology and political behavior are obviously simplified, the answer is that the same can be said of the laws of motion formulated by Galileo, which hold that the identical formulas apply to all falling bodies, whether heavy or light.

Galileo knew perfectly well that as a matter of everyday uncontrolled experience Aristotle was right and that stones, for example, usually fall faster than pieces of paper. What Galileo meant to do was to provide a schematism of fundamental laws permitting the logically organized prediction of the phenomena of motion and directing controlled inquiry into the conditions, like friction or wind factors, which in particular cases cause apparent deviations from these laws. Hobbes stood in the same relation to Galileo that 19th- and 20th-century social

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[9] T. HOBBES, *Elements of Philosophy Concerning Body*, in F. WOODBRIDGE, THE PHILOSOPHY OF HOBBES 7 (1903).

[10] *See* T. HOBBES, DE CIVE OR THE CITIZEN 15 (S. Lamprecht 1949):

> Therefore, it happens that what was last in order, is yet to come forth first in time, and the rather, because I saw that grounded on its own principles sufficiently known by experience it would not stand in need of the former Sections.

thinkers like Justice Holmes have stood to Darwin. He wished quite consciously to do for human psychology and politics what Galileo had done for physics. He thought, indeed, that he was spelling out the implications of Galileo's principle of inertia for the study of human nature and society. Hobbes was not a descriptive anthropologist collecting examples of the varieties of human behavior. He was not an omnivorous student of all past theories of human nature. As he said, if he had read as many books as other men he would have been as great a fool as they. He was a reasoner, a cogitator, a man who, like his great comtemporary Descartes, wanted to think things through clearly and distinctly for himself and work out the basic logic of the human situation.[11]

What, then, is this logic? It is that people cannot live alone but cannot live together very easily either. Men desire to come together. Their inclinations and vital needs push them in this direction. But without a sagacious effort in education and in the construction of effective social institutions, they nevertheless cannot sustain a cooperative life and are bound to break away from one another in dissension and violence. And this effort in education and social construction has to be renewed in each generation because in each generation the human animal, all over again, is born ignorant and undisciplined, and, unless controlled, will set about to destroy what has been built with so much time and trouble to keep him at peace. In Hobbes' words,

> . . . I deny not that men (even nature compelling) *desire* to come together. But civil societies are not mere meetings, but bonds, to the making whereof faith and compacts are necessary: the virtue whereof to those who have not yet tasted the miseries which accompany its defects, is altogether unknown; whence it happens that those, because ignorant of the benefits it brings, care not for it. Manifest therefore it is, that all men, because they are born in infancy, are born unapt for society. . . . [W]herefore man is made fit for society not by nature, but by education . . . .[12]

This education cannot consist, in the first instance, in reasoning and verbal persuasion. Beyond a point you cannot reason with children about the need for social rules because they lack the experience to judge

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[11] None of this is to say that Hobbes was an ignorant man. He knew the classics and his first published book (1629) was a translation of Thucydides. Hobbes' affinity to Thucydides is constant. He never lost that historian's view that although human beings make their decisions for all sorts of reasons ranging from faith in oracles to overweening pride, and although they may surround what they do with elaborate and sincerely intended moral explanations, the driving and ineluctable factor in the affairs of men and nations is rivalry for power.

[12] T. HOBBES, *supra* note 10, at 21-22; 1 J. PLAMENATZ, MAN AND SOCIETY 119 (1963), points out the central significance of this passage in understanding Hobbes' thought.

the value of these rules. They need to learn them simply as imperatives imposed upon them, and they need to be helped to remember them by the judicious display of the mnemonic device known as force. They need to internalize them, to judge their own conduct habitually and voluntarily in relation to them, and to judge other people's conduct similarly, expecting that consequences will follow from their violation. This is not a recommendation that physical force should be the basic instrument for bringing up children. It is a comment on the basic importance of the social environment. If it does not do its job, the application of force will be ineffective. The discipline of strong, functioning social institutions whose power to impose themselves on the individual cannot be doubted and whose authority to do so people do not deny is the primary instrument of education. It gives shape to human personality, which would be a chaotic welter of conflicting and unharnessed drives without it. Such a social environment, doing its educational work, alone makes possible the avoidance of force and violence as everyday affairs.

Nor are adult, civilized human beings ever to be supposed to be free from the need for such stabilizing institutions. The child remains in them; their native unaptness for society lies just below the surface of their civilized ways. Education and the disciplines of civilized life do not annihilate men's and women's self-centeredness, their voracious demands upon the world, their readiness to sacrifice themselves and others to momentary passions, or their fears of the dark and of death. These are merely modified and held more or less within bounds, and when authority weakens they break out. The prime problem of society, therefore, is to establish and maintain authority—to create conditions under which no one doubts what the rules are or whether they will be enforced. And since rules are general, and there are bound to be doubts about their application in specific cases, this means in practice that there is a need to establish without equivocation who shall interpret and enforce the rules, and where the final judgment shall lie.

All this depends, it will be obvious, on a theory of human nature, and since that theory, today as in Hobbes' day, is commonly put down as malign and therefore palpably false, we had better take a closer look at it. In part, unquestionably, it is a view of human nature to which both the individualism and the ravaging wars of the 16th and 17th centuries gave currency. But it has a longer pedigree. A hundred and fifty years before Hobbes wrote his books Machiavelli had expressed a conception of human desire similar in many respects. But that view was in turn one that can be found by reading the ancient classics, Christian and pagan.[13] Man is so constituted, according to this view, that the sacrifice of an

[13] J. MAZZEO, RENAISSANCE AND REVOLUTION 75-79 (1967).

appetite tends to increase that appetite. Human wants, therefore, are insatiable. There can never be tranquillity, and never enough wealth or power or glory to go around. "Life is incontinence."[14] So the ineradicable conditions of human life are envy, distrust, and competition, the feeling that what one has can never be enough, the fear of what the next man will do to you because he has more than you, or less. "Nature," said Machiavelli, "has created men so that they desire everything, but are unable to attain it; desire being thus always greater than the faculty of acquiring, discontent with what they have and dissatisfaction with themselves result from it."[15] The prime problem of human nature, to Machiavelli's mind, was that human desire was infinite but lacked an infinite object on which to focus. Machiavelli offered no solution to this problem, but only a commentary on its political implications.

In the 17th century Pascal took the same view of human nature but proposed, as a Christian and mystic, to solve the problem by looking beyond earthly finitude to the infinitude of God.[16] Hobbes, in contrast, was not a Christian mystic but a man irrevocably secular in his outlook. He took for his own the conception of the endlessness until death of human desire, but he stated it with less bravura than Machiavelli and with a certain English discomfort at what is excessive and out of bounds. He did not see it, as Machiavelli had, as the source of human energy and valor, but only as a force disruptive of peace and quiet. As has been remarked, Hobbes "seems to have prided himself on his timidity as other men do on their courage."[17] His view of human nature was in general one that gave more emphasis to the cautious and prudential tendencies in man, and stressed his disposition to rationalistic calculations. He did not see, as Machiavelli did, a kind of objectless flow of energy, a superfluity of undefined libidinal purpose, present in each specific desire and making it a desire for something more than the agent himself might know or say. In Hobbes' picture of the human mind and spirit, men seek fairly well delineated and reasonably specific goals. They tend to know what they want, and their intellectual efforts are designed simply to construct the most efficient strategies for securing

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[14] *Id.* at 77.

[15] N. MACHIAVELLI, DISCOURSES 37 (L. Walker transl. 1950).

[16] We do not know if Pascal ever read any books of Hobbes, although he probably met him personally. There are, however, striking coincidences in their ideas about man, and in their actual turns of phrase. See R. POLIN, POLITIQUE ET PHILOSOPHIE CHEZ HOBBES 25 (1953):

> Mais alors que tout le sens de la meditation pascalienne se concentre sur la situation metaphysique de l'homme, la description de Hobbes se borne a placer l'homme, comme un corps semblable aux autres, dan l'infini des corps composant l'univers. Au tremblement du metaphysician, Hobbes n'oppose que la curiosite emerveillee du savant.

[17] J. PLAMENATZ, *supra* note 12, at 117.

these goals. The inexhaustibility of human desire is more in the endlessness of the chain of goals than in the unsuspected complexity and unrealized vastness of each particular goal.

Nevertheless, it is a quality of insatiability in human nature, this characteristic of the species such that it can be said that human beings in fact seek no final goal or *summum bonum* but simply move on from one desire to another, stopping only at death, which provides Hobbes with the linchpin to his psychological and social theories. It is his Galilean principle of inertia—his application of the central law that bodies keep moving until they are forced by collision with other bodies to change their course or come to rest. In this perspective human felicity can mean nothing but continuous success in the satisfaction of desire. The best felicity of which we are capable, therefore, indispensably requires peace and security, law and order. Liberty is what is left over when these essentials are provided for.

2. Analysis of Hobbes' Perspective

There are a variety of attacks that have been made on the Hobbesian perspective. One, as I have suggested, has been simply to reject it for taking so dim a view of human nature, as though it were a sin against the Holy Ghost to think so badly of one's own species, or oneself. But taking a dim view of human nature, we should not need to be reminded, is an old Christian habit. Hobbes' ideas repeat, in their essentials, the account of man's character descended from St. Augustine. What was new about Hobbes was his thorough emancipation from the hope of emancipation. He did not think human beings could be saved from the human condition of egoism and concupiscence—certainly not in this world, and he shows no conspicuous concern about the next. Politics was his concern, secular politics, and this was the business not of turning man into a being with whom angels can consort but of constructing institutions capable of keeping an unruly creature in harness.

Indeed, in one fundamental sense, Hobbes does not take a dim view of human nature. His critics regularly misread him by attributing to him their own values. He does not think that man is wicked for having the desires he does; he does not take these desires as signs of the Fall. He takes them to be the only standards man can ultimately have for determining what is good or evil. "Good" means the rational satisfaction of human desires: any desire that is bad is simply a desire that blocks too many other desires. Hobbes is the first thoroughly systematic and single-minded secular political theorist in the modern Western world. What was shocking about "Hobbism" in Hobbes' own time was not its pessimism but what seemed its implicit atheism.[18] And what is capable

[18] Isaac Newton once apologized to Locke for having misunderstood him and thought him a "Hobbist."

of shocking us today, in the context of our own times, is its total lack of the secular evangelical spirit, its indifference approaching obtuseness to any hope for the conversion of human nature to finer stuff. Hobbes did not merely disagree with reformers' visions; he distrusted moral visions as such. He feared zealots. He thought that human egoism was manageable so long as everyone recognized that no one was exempt from it, and that if life were to be lived everyone would have to play by common rules. Zealots were dangerous because they thought themselves above such a social understanding. They condemned other people's egoism but mistook their own egoism for the Word of God and thus put themselves above the common life. He lived in a bloody period of religious civil war. Introduce the hope of salvation into politics, he believed, and you have merely found another way to inflame human egoism and bloody-mindedness.

But we are left with the question whether Hobbes' view of human nature is true. That it accurately describes widespread forms of behavior in times of acute social dislocation can hardly be doubted. Insecurity promotes suspicion, conspiracy, and preoccupation with self. These, in turn, promote insecurity. On the other hand, neither can it be doubted that as a straight-forward description of human motives in stabler circumstances it is more limited in its validity. Self-love, as David Hume said, may be the strongest single motive in the human breast, but it is often outweighed by the combination of other feelings that are also present, like devotion to one's children or concern for the shared enterprises of one's community. Yet this response moves only part of the way in refuting Hobbes. For Hobbes did not suppose he was describing human nature as a botanist might describe the varieties of azalea. He was picking out the salient features of human nature from the viewpoint of law and government. He was interested in determining what basic ideas we are prepared seriously to adopt as premises for the creation and operation of institutions like the state, the courts, legislatures, contracts, and the control of undesired behavior. And it is in these terms that he asserts that we are not and will not be prepared to build our relations to others on an assumption that human good will is capable by itself of taking care of things. In his words, "We must therefore resolve, that the original of all great and lasting societies consisted not in the mutual good will men had towards each other, but in the mutual fear they had of each other."[19]

He is, if you will permit me, the lawyer's philosopher *par excellence*. A typical description of the functions of the law is that it exists to provide security of expectations, a workable means of settling disputes,

[19] 2 T. HOBBES, THE ENGLISH WORKS OF THOMAS HOBBES 4-5 (W. Molesworth 1841).

and a method for regulating social change.[20] Without law, such a catalogue of its functions suggests, it is to be supposed that life would be insecure, riven by disagreement, and in the grip of forces out of anyone's control. Hobbes' thesis is not substantially different, and it is not an easy one to refute. And it leads inexorably to the conclusion that in the game of law and politics, as Hobbes said, when all the suits are played clubs are trumps.

Indeed this essential thesis of Hobbes' stands up, I believe, even if we adopt a quite different psychological theory from his. Assert that human beings have wells of benevolence within them which social institutions based on faith in this benevolence will call forth. But the question remains whether human beings, however benevolent, will not be inevitably partial in this benevolence, treating the interests of family, friends, and native place more seriously than interests farther away. Even if they were to take in the whole world in a single scheme of equal and impartial consideration the problem would remain. Whose scheme would it be? "The English," Treitschke once said to a class at Berlin, "think Soap is Civilization." When people do their unselfish best they nevertheless cannot help but define the best in terms of their own assumptions, assurances, and anxieties. They may learn to break through to another group's or class' world to some extent, but they cannot take themselves wholly out of their own skins. And this is true also for individuals living in the same cultural milieu or social class. Each individual's experience, like each individual's fingerprint, has unique characteristics. In the application of general standards of right and wrong to specific cases, therefore, reasonable men can be expected sometimes to disagree. Accordingly, if social decisions have to be made there has to be a decision-procedure which is accepted, and power is an uneliminable element in the situation.

Indeed, the argument holds whether or not we believe a method exists for objectively ascertaining right and wrong in human affairs. Perhaps there are seers or philosophers who possess such a method, but such people are few and far between, and as a matter of political reality they are not likely to persuade their fellows to employ this method by appeals to reason alone. So, whatever the philosophical truth may be about the true, the good, and the beautiful, we have to proceed, in our common life, by accepting some practical procedure for determining what is legally right or wrong. In sum, the central presupposition that one must make to adopt something like Hobbes' legal positivism is simply the stubborn incommensurability and intractability of different individuals' standards and expectations of life. Those who would escape Hobbes must in some way escape the thrust of this point.

[20] *See* Jones, *Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023 (1974).

Of course, it is possible to imagine societies in which such differences in individual viewpoint are greatly minimized.[21] But they would

[21] The argument that Hobbes' position cannot be defended except on the basis of assumptions about human nature that have only a limited historical validity is the last defense of those who would escape the force of Hobbes' basic position. Hobbes, says the distinguished Canadian political philosopher, C. B. Macpherson,

> is attributing to human nature in the abstract a quality which is largely a product of the social relations set up among members of the upper classes by the Renaissance encroachments of capitalism on the older society.

C. MACPHERSON, *supra* note 6, at 241. In further elaboration of this point, Professor Macpherson writes:

> The postulate of the dominance of competitive material appetites is crucial to Hobbes' theory of the state. And it clearly derived from the behaviour of man in bourgeois society. The argument is that men are fundamentally hostile to each other because they have appetites for things which they cannot enjoy in common, and of which there is such scarcity that all who want them cannot have them.

Id. The implication is that there are conceivable ways of so organizing human political and property relations that human beings will not display this egoism and passion for precedence. Thus, Professor Macpherson writes:

> The social ties in capitalist society are real, being largely determined by the individual's relation to capital, but are not as cohesive as the social ties of other societies. The result is that on the whole a stronger state is necessary to maintain a capitalist society than is needed to maintain a society in which the social relations are more obviously personal, or more obviously purposeful, and so more easily understandable. The latter society can be kept going by customary moral codes the strength of which is automatically renewed because the relations are visible and their value is readily perceptible. A capitalist society needs stronger political sanctions.

Id. at 249.

Needless to say Hobbes wrote at a time when a more powerful middle class focused on commerce, banking, and accumulation of capital, and the acquiring of more possessions and prestige, was creating attitudes challenging the traditional codes of aristocratic chivalry and Christian brotherhood. Hobbes, unquestionably, is a creature of these more secular and aggressive perspectives.

However, the statement that Hobbes' "postulate of the dominance of competitive material appetites is crucial to Hobbes' theory of the state," and the further proposition that this postulate "is clearly derived from the behavior of man in bourgeois society" seems to me triply mistaken. First, the postulate is not necessary to Hobbes' theory of the state. The irreducible practical diversity of individual tastes and the limits of human time, energy, and physical security— in brief, human mortality—are sufficient to support his basic theory. Secondly, the postulate is not "clearly derived" from behaviour in bourgeois society. Homer's heroes exhibit competitive material appetites, and the Christian view of man, proclaimed in feudal agrarian society, also gave prominence to these appetites. Thirdly, Hobbes' assumption about the inevitability of scarcity is not vulnerable to attack on the ground that technologies improve or that the scarcity is relative to a particular historical era's grasping standards of human satisfaction. Hobbes believed that scarcity was also a product of the human incapacity ever to feel wholly safe and satisfied. However abundant resources may be, there will therefore be competition and disagreement about their distribution. This assumption is not an historical assumption; if it is to be challenged, it has to be challenged in its own terms.

be societies either far simpler than that which Hobbes had in his mind's eye or incomparably more tyrannical. They would be either isolated, homogeneous, and stationary societies ruled by custom, or they would be totalitarian. Hobbes had different values. They went, indeed, far beyond the peace, security, and simple utilitarian satisfactions which the textbooks simplistically attribute to him. He tells us what men lose if they do not build an effective system of law and order but fall back into their "naturale condition":

> In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of time; no Arts; no Letters; no Society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poore, nasty, brutish, And short.[22]

This is not simply a bad dream. It comes very close to describing life in the back country anyplace in the world where the authority of traditional society has broken down and law and the state have not managed to take over effectively. Hobbes does not hanker after that image, which seems never to die, of an unspoiled older world which supposedly existed before the wars, the skepticisms, and the moneymen. He assumes the superiority of a complex, Promethean society, seeking to control nature, exercising the more difficult skills, innovative, explorative, commited to arts, letters, sciences, and aware of itself as part of an historical enterprise testing what human beings can accomplish. An efficacious legal system is the indispensable framework for the governance of such a society. In Hobbes' perspective, the price for preferring the simplicities of customary moral codes and the intimacies of more personal forms of social control is an impoverishment of civilization and of the species' best ambitions for itself. This is the emotive spark in his philosophy, what ultimately lies behind his conviction that people ought not to break the law.[23] And it is in terms of the needs and conditions of life in such a complex society that we must take the variability and idiosyncrasy of individual preferences as points of departure for social organization. Those who would reject Hobbes must ask themselves whether there is not in their own perspective a lingering nostalgia for the comforts of the primitive.

Where, then, does liberty fit in? It is connected to Hobbes' assump-

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[22] T. HOBBES, LEVIATHAN 186 (C. Macpherson 1968).

[23] I do not touch here on the technical problems raised by Hobbes' effort to conjure up the concept of obligation out of the "state of nature."

tion concerning the irreducibility of individual differences. Hobbes did not desire, nor did he conceive the possible efficacity of, a great governmental effort to put people's minds or morals into the same mold. One did, through law, only what was necessary and possible, and both of these were restricted. So it is that Hobbes assumed that the purpose of law was, in his words, "to defend private men in the exercise of their several trades and callings."[24] He imagined them free to buy and sell and make contracts, to choose their own abodes, to teach their children as they saw fit.[25] Though he favored absolute government, he did not contemplate totalitarianism. He assumed simply that without a unified and unchallenged legal system, without a clear understanding of where the right to use force lies, life, liberty, property, and high civilization cannot be secure. To be sure, there are no predetermined limits, in Hobbes' view, setting off liberties which the law may not under any circumstances touch. Nevertheless, if there is to be liberty, then there must be law.

The point, I think, is quintessential to any defensible jurisprudence of liberty. Law and liberty are correlatives. Men cannot be said to have liberty merely because, as it happens, no one is preventing them from doing what they want. To have a liberty is to have a settled expectation of being able to do certain things without others interfering. It is to function within an accredited understanding that one has the right to do what one is not forbidden to do. This requires that there be in existence a recognized set of rules imposing obligations on people not to interfere with others. In a modern setting, this supposes an effective legal system with established procedures for making and remaking rules and applying them to particular cases.

Then has Hobbes said all that we know and need to know about the jurisprudence of liberty? Obviously, most of us would hope not. His philosophy is compatible with parliamentary government but he displays no great devotion to that cause. He is anything but a spokesman for religious persecution, but he has little sympathy for the rights of conscience. But to disagree with Hobbes on these grounds is merely to assert our own preferences. Is there a deeper level on which we can meet and wrestle with him? Let me put aside this question until we have had a chance to consider the contrasting perspective of Locke.

B. John Locke

1. Locke's Perspective

John Locke was not a visionary. He certainly did not see human history as a stage on which mankind would progress towards goodness

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[24] T. HOBBES, *supra* note 22, at 386.

[25] *Id.* at 264.

and happiness. But in his perspective, liberty is part of a larger design, divine in origin, which sets men's basic obligations unmistakably before them. This extra-political vision, which is present in Locke and absent in Hobbes, may help explain why Hobbes' influence has been mainly on theoreticians—in economics, positivistic jurisprudence, interest-group political analysis, or decision-theory, he is the initial instigating force if any single figure may be said to be—while Locke's influence has been practical as well. In France in the 18th century his ideas on politics were put next to Newton's on physics. In America the colonists, though perhaps they actually read him less than is supposed,[26] certainly thought of him as the main source of their revolutionary ideas. For almost three centuries, indeed, Locke has been the great, the omnipresent, Whig.

Hobbes preached prudence, preached it so imprudently as to antagonise almost everyone. Locke *was* prudence—prudence by helpless instinct, probably, even more than by conscious conviction. What is most conspicuous about his system of political thought is that it is not a system. Basic principles are rarely analyzed or argued. Each time that we imagine that Locke is about to take us down a given road step by logical step he introduces a qualification, loses interest in what is clearly only a ruminative possibility, makes a common sense observation, and we are back under a quiet English sky, with the edges of objects a bit vague and distant things not too visible, but surrounded close at hand with what is snug, reassuring, and familiar.

I do not mean to imply that Locke was dull. The words that describe him are judiciousness, balance, and a dislike for intellectual immodesty. He is suspicious of high speculation because he didn't think that even the wisest of men could offer more than pretentious guesses about the ultimate mysteries, and he thought that it would be better to use the human mind for more promising and important purposes like the practical governance of human affairs. The central purpose of his most ambitious work, the *Essay Concerning Human Understanding*,[27] was to show that "the candle that is set up in us burns brightly enough for all our purposes," and that where it does not burn brightly it is a mistake to waste it by trying to use it.

He had an unusual quality of imagination, in a special sense of that word. He caught an emerging spirit in his time, a feeling about the world taking shape around him, and expressed it superlatively. It was the attitude of good Christian men and women, essentially old-fashioned believers, who were nevertheless exposed to the ideas of the 17th cen-

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[26] *See* Dunn, *The Politics of Locke in England and America in the Eighteenth Century*, in JOHN LOCKE: PROBLEMS AND PERSPECTIVES 45 (J. Yolton ed. 1969).

[27] J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (A. Fraser 1894).

tury, and who had the presentiment that perhaps something new was afoot, that just possibly the affairs of men could be guided reasonably as well as piously. Without Locke, in all probability, the 18th-century Enlightenment could not have proceeded with its immense exercise in intellectual housecleaning while still retaining the assurance, except for a few skeptics like Hume and Diderot, that it remained truly Christian in its basic premises. He gave the century its assurance that Christianity was reasonable and reasonableness was Christian. And without Locke the 18th century could perhaps not have coined the slogans of such extraordinary revolutionary force that it did while hardly ever imagining the upheaval it was preparing. In him we can find one prototype of the classic liberal: a man of basically conservative temper who merely thinks that people can be trusted to respect authority even if they ask rational questions about it, and who doesn't conceive that he may be turning loose a whirlwind by enunciating this modest maxim. Locke illustrates to what extent political and intellectual liberalism, as they emerged in our civilization, were grafts on an older culture.

Locke's *Two Treatises on Civil Government* had one major and simple objective. It was to take the Whig side in the long 17th-century quarrel with the Tories and to assert the right of subjects of the King to resist royal authority if the King exceeded the bounds proper to him.[28] In this respect he took the opposite position from Hobbes, whose political philosophy was aimed principally at those who insisted on the right to resistance. The *Treatises* therefore present a kind of conundrum. Why do these essays, which are polemical in character, not respond directly to Hobbes, surely the most formidable spokesman for Locke's opposition? Except for two or three passages they leave Hobbes strictly alone, and they never mention his name at all. This was certainly not because Locke was unaware of Hobbes.[29] But the answer

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[28] The essays were published in 1690, but recent scholarship indicates that in their essentials the TWO TREATISES were composed years before the Glorious Revolution of 1688 which sealed the Whig victory. Locke's discussion of the right to resist was not influenced, therefore, by a desire to justify recent events, as it has been traditional to suppose, but first took shape as part of the Whig effort to obtain acquiescence to the principle that royal prerogatives were limited. *See* J. LOCKE, TWO TREATISES OF GOVERNMENT 3-15 (P. Laslett 1960). To be sure, it is still important to recognize that Locke chose to publish them in 1690, as a political charter for "our Great Restorer, Our present King William." See J. DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE 53 (1969):

> Hence they [the TWO TREATISES] must be supposed to contain broadly Locke's interpretation of the English constitution at this time and his conception of the rationale for it, the criteria by which it was to be judged as "the best possibly that ever was."

THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE 289 (B. Rand ed. 1927). *See also* M. CRANSTON, JOHN LOCKE: A BIOGRAPHY (1957).

[29] There is an entry, written in French, in Locke's notebook in the 1680's which indicates that he caught Hobbes' intention very well:

seems to be that Hobbes was too far on the periphery, so far as practical men were concerned, to be worth refuting in a practically oriented political pamphlet. Hobbes, by his extremism and irreligion, had repelled the supporters of royal absolutism as well as the Whigs. He might have been intellectually formidable—which would also discourage an effort to debate with him directly—but he was not politically formidable. And, in addition, he approached the problems of politics from a point of view so different from Locke's in its moral and metaphysical premises that it could not, in Locke's own mind, challenge his Whig beliefs as powerfully as a point of view which started more or less where he did, but came out with quite the opposite political conclusions.

Locke's adversary in the *Treatises*, therefore, was Robert Filmer, the author of an apology for royal absolutism called *Patriarcha* which exercised a considerable influence in its day. Like Locke, Filmer was a good Christian. Like Locke, he had the habit of going to the Bible for authoritative answers to political puzzles. But unlike Locke, he had come to the opinion on Christian grounds that no right to resistance existed. Kings held their titles in direct line from God's first grant of sovereignty to Adam. The basis of legitimacy was patriarchal, paternal. Kings were fathers of their people. And to resist them was to break the Fifth Commandment which enjoins upon us respect for our parents.

The argument may seem hard for most of us to take quite seriously today, but this is a measure of Locke's victory over it. It was, in the 17th century, an incomparably more influential rationale for the doctrine that kings should be unquestioningly obeyed than Hobbes' pragmatic and secular argument about a social contract to obey.[30] In taking Filmer on, Locke was going to the heart of the practical issue, and what he did was to change Protestant Christianity as much as he changed politics. In effect, he took the theological doctrine that each man is responsible for the fate of his soul, and employed it to undercut the idea that, in law and politics, adults should be treated as children who owe obedience to a parent. "Equality," when a political philosopher invokes the term, is always best understood as the denial of the legitimacy of a specific

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> [H]obbes tacha de mettre la Morale en un ordre geometrique et d'etablir l'hypothese d'Epicure qui pose pour principes des societez la conservation de soi meme et l'utilite. En effet le but principal de Hobbes etoit d'etendre le pouvoir des rois sur le temporel et sur le spirituel contre les seditieux et les fanatiques ce qui lui a fait dire des choses qui ne s'accordent pas avec le repos de la societe civile ni avec la religion Chretienne . . . .

J. DUNN, *supra* note 28, at 81 n.1.

[30] See P. LASLETT, THE WORLD WE HAVE LOST (1965). In 18th-century New England, the Fifth Commandment was regularly put to political use. It was invoked, indeed, not only in instances of disobedience to political superiors but in cases in which individuals departed from the established duties of their social and economic stations.

form of inequality. When Locke said that all men are created equal, he meant to say that the parent-child model of superiority and inferiority does not apply to the relation between rulers and their subjects. Civil authority, legal authority, is not paternal authority.

The arguments that he offered in support of this point constitute the substance of Locke's political philosophy. His problem was to square his rejection of the parental model with certain features of the political world, a world that had to be assumed to be in some way a product of God's design. One of these features is that politics and law involve subordination and superordination. Certain people are set above other people and have a right to command them. And this right is a fairly extreme right. It is "a right of making laws with penalty of death, and consequently all less penalties . . . ."[31] God has given each individual his life as a gift and forbidden him to take his own life. Man "has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it."[32] Yet in political society men may lawfully take the lives of others. What can justify these awesome powers?

Locke's answer was not notable, as was Hobbes', for its enunciation of basic propositions about human psychology or its analysis of ethical first principles. Yet it is a profoundly plausible answer—plausible in its own day and still plausible in our own much less God-fearing day. Its plausibility came from Locke's easy, invincible appeal to common experience. His argument turned on maxims of ordinary prudence to which almost all of us give testimony in our daily behavior.

One of these maxims might be paraphrased quite simply: Nothing is good in excess. The good Lord created a world in which we find that some people are placed in authority over other people. But God, who is rational, would not give them more authority than is necessary and desirable to achieve His purposes. And His purposes, though much in them is dim, can nevertheless be read well enough by us for our everyday purposes. He wishes that we should do His will and prepare our souls for eternity. To do this requires that we be left free by civil authority to go about our fundamental business. Government and law should do only what is strictly necessary to preserve our common lives together in a manner compatible with our ultimate duty to serve God. This requires that force be used even to the point of the penalty of death, but it does not give governments unlimited authority to employ such sanctions. In God's plan everything that exists has its sufficient reason but no more, and it does not fit the reasonableness of God's plan that rulers, who exist for specific and limited reasons, should have unlimited power.

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[31] J. LOCKE, THE SECOND TREATISE OF GOVERNMENT ¶ 3, at 4 (T. Peardon 1952).

[32] *Id.* ¶ 6, at 5.

Of course, this raises a question. Admitting that civil government possesses only a limited authority, why does this imply a right to resist? The limits on the authority of rulers are set by Laws of Nature decreed by God. Why should not the settling of accounts with those who break these Laws be left to Nature and God? Locke's answer, again, was pragmatic and moderate. On the whole, men should be careful not to resist. Resistance has consequences that no one can foresee. Locke has no sympathy for "the pride, ambition, and turbulence of private men," which he recognizes, "have sometimes caused great disorders in commonwealths."[33] But there can come a point when enough is enough. A government can be so insistently illegitimate in its actions that the everyday securities and decencies on which people count, and on which they must count to go about God's business, are put in jeopardy. God could hardly ask that people accept this meekly.

> Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty will be born by the people without mutiny or murmur. But if a long train of abuses, prevarications, and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under and see whither they are going, it is not to be wondered that they should then rouse themselves and endeavor to put the rule into such hands which may secure to them the ends for which government was at first erected . . . .[34]

He has invoked, in short, another commonplace maxim: God helps those who help themselves. To argue that the sanction of resistance not be imposed when the ruler claims that everyone but he must be under the restraint of laws "is to think that men are so foolish that they take care to avoid what mischiefs may be done them by polecats or foxes, but are content, nay, think it safety, to be devoured by lions."[35] He may have had Hobbes in mind when he wrote this passage. And to say that men must put up with a settled design to tyrannize over them is "to bid them first be slaves, and then to take care of their liberty; and when the chains are on, tell them they may act like freemen."[36] One acts when one can, and not when it's too late.

Indeed, when one rebels against the concept or practice of absolute government, one merely asserts another of the fundamental lessons of social experience: it is that no man can be allowed to be judge in his own cause. The pomp and power that go with government and law do not require us to stop using our heads; a maxim so fundamental in

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[33] *Id.* ¶ 230, at 129.
[34] *Id.* ¶ 225, at 126.
[35] *Id.* ¶ 93, at 53.
[36] *Id.* ¶ 220, at 123.

everyday affairs surely applies as well to the relation of subjects to their rulers. "[T]here, and there only, is political society, where . . . all private judgment of every particular member being excluded, the community comes to be umpire . . . ."[37] Government exists for but three reasons: To provide "an established, settled, known law, received and allowed by common consent to be the standard of right and wrong;"[38] to provide judges "known and indifferent"—indentifiable and impartial—"with authority to determine all differences according to the established law";[39] to create "a power to back and support" the decisions of the magistrates.[40] It is only the better to preserve their lives, liberty, and property that men accept government; its job is essentially that of umpire and night watchman. In a good society we would not be aware of its presence very much, and would turn to it mainly to settle limited disputes with our fellows over the application of accepted laws to particular cases.

Liberty, in such a perspective, is essentially a combination of two things: First, security against the arbitrary will of other people—in other words, a condition of being restrained in accordance with a known, settled, and impartial law; and second, it is the enjoyment, with only the minimal forms of interference necessary, of all the spontaneous and ordinary activities of life—religion, family, education, farm or business, friendships, study.

2. Analysis of Locke's Perspective

There are three things that must be added to fill out this account of Locke's perspective. Although Locke makes them only partly explicit, they govern his thinking everywhere. The first is a certain assumption about the general run of human beings. It is that they are essentially conservative. There is, he says, a "slowness and aversion in the people to quit their old constitutions." Locke was well aware of the question that his adversaries would ask about his doctrine, and he had an answer to it:

> To this perhaps it will be said that, the people being ignorant and always discontented, to lay the foundation of government in the unsteady opinion and uncertain humor of the people is to expose it to certain ruin; and no government will be able long to subsist if the people may set up a new legislative whenever they take offense at the old one. To this I answer: Quite the contrary. People are not so easily got out of their old forms as some are apt to suggest. They are hardly

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[37] *Id.* ¶ 87, at 48-49.
[38] *Id.* ¶ 124, at 71.
[39] *Id.* ¶ 125.
[40] *Id.* ¶ 126.

> to be prevailed with to amend the acknowledged faults in the frame they have been accustomed to. And if there be any original defects, or adventitious ones introduced by time or corruptions, it is not an easy thing to get them changed, even when all the world sees there is an opportunity for it.[41]

Thus it is that when Locke assays the dangers to the people's rights and basic security he puts the emphasis in a quite different place from Hobbes.

> [W]hether the mischief has oftener begun in the people's wantonness and a desire to cast off the lawful authority of their rulers, or in the rulers' insolence and endeavors to get and exercise an arbitrary power over their people—whether oppression or disobedience gave the first rise to the disorder, I leave it to impartial history to determine.[42]

He doesn't leave much doubt as to the verdict that he thinks impartial history will give. He sees government taking place and laws being made inside a settled order of habits, conventions, and people going about their daily tasks. If that order erupts it is usually because it has been disturbed from the outside. The rulers have taken too much on themselves; they have got out of hand. And thus the basic safeguards in law and government must be erected against the rulers and not the individuals they rule. To preserve society against injustice it is imperative that the citizens have definite rights, clear personal domains for the exercise of their autonomy. Locke's liberalism is a function of his belief in the natural, self-adjusting stability of society.

Of course, Locke himself, in coming to this judgment, clearly had his own countrymen in mind. He was writing, too, we must recall, in a quieter time than that of Hobbes, when religious and political passions had somewhat subsided and there was a less obvious daily need for effective police power. No doubt his views cannot be translated without amendment into meaningful doctrine for all times and places. Yet that assumption cannot be altogether dismissed as culturally or historically parochial. We live in an era of revolution and of major efforts, led by governments, to shake the people out of their inertness and make them break with their established ways. The enterprise, everywhere, has turned out not to be simple. "People are not so easily got out of their old forms as some are apt to suggest."[43] The price of attempting seriously to do so is very great, and it has yet to be shown anywhere that the gains outweigh the costs. A liberalism like Locke's, with its sense of the limited capacities of law and government, is often put down as a counsel

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[41] *Id.* ¶ 223, at 125.
[42] *Id.* ¶ 230, at 129.
[43] *Id.* ¶ 223, at 125.

of timidity. Perhaps so, but it should be remembered that the timidity has to do with breaking people's heads—other people's.

We are brought to the second pervasive assumption in Locke's outlook. It is the assumption that law is secondary, not only in principle but in fact, to an antecedent morality. Hobbes to the contrary notwithstanding, men do not and cannot develop an ethical code out of a consideration of their individual interests. The reverse also holds: They have to see their interests at least in part in terms of their ethical standards. And they simply have these standards. In everyday practice they take them as though they were self-evident. When they disagree over morals, indeed, it is not usually over general principles, but over the application of these principles to particular cases. To be sure, there are people who seem to be entirely without morals. To be sure, too, most people show a tendency to shave moral principles here and there. We cannot do without law and policemen. But law and policemen are able to do their job only because, in the community at large, there is a general recognition of the principle that there is a difference between right and wrong and a basic consensus about where that difference lies.

It is comparatively easy to attack Locke's effortless assumption that there are self-evident natural rights. I have myself engaged in that exercise on occasions. But in most societies there are terms for dealing with others which are generally thought to be the right terms, and which people accept as points of departure for thought and conduct without searching their minds and consciences for the reasons. They may find, as the conditions of their lives change, that some of these principles must be abandoned or reinterpreted. The metaphysical doctrine of eternally true, pellucidly clear, natural rights is a serious obstacle in the way of such moral and social reconstruction. But any such reconstruction has to begin with premises—and the premises are not invented, they are given to us as the creatures of a particular society and history that we are. In these practical terms, Locke was right. God, Nature, and Logic may fail us as guides to indubitable first principles, but this does not mean that we have no place to start when we seek to find rules for morals and politics.

The third characteristic of Locke's perspective is implicit in what I have said. Society is not to be confused with the State. Society, within which morality grows, is composed of the thousand and one natural associations into which men fall by instinct, inclination, tradition, and accident: families, villages, clubs, companies, guilds, professions, colleges, churches. These are where, day to day, the education and government of man goes on most effectively. The great business of society, spiritual as well as secular, is done in these associations, not by the State.

The landscape of Hobbes is a dry windblown desert where each

man's feet are set in sands shifting beneath him and he must calculate his steps first and last. The landscape of Locke is a gentle, thickly cultivated portion of the temperate zone covered with communties and associations holding people together by the bonds of affection and communal disciplines as well as mutual interest. Law and government do a necessary work, but the sense that they are indispensable to the taming of man or to shaping him so that he can become "apt for society" is missing. Locke takes a stable civilization for granted, as he does the resilience and autonomy of the separate small societies out of which political society is composed.

Locke is said to be, and justly, the great progenitor of the modern individualist and liberal philosophy. But it is an individualism and liberalism embedded in a much larger traditional culture. For Locke rebellion is not a way of life but a last resort. The exercise of critical intelligence is necessary, but it no more defines the nature of human virtue or the quality of a happy life than the right to engage in litigation defines the good society. Locke's individualism and liberalism are offered not as interpretations of life's meaning but simply as protective medicine against possible diseases. He assumes a traditional culture; he assumes the hold of family, neighborhood, and church; his outlook is more agrarian than urban.[44] He wishes only that within these collectivities and hierarchies the private judgment of people be tolerated and their opportunities to make choices somewhat expanded. He would not destroy the old order. He would merely loosen it a bit, give individuals somewhat more room to move about and rather more security against arbitrary rule.

This is Locke's strength—his inability to think in extremes, his sense for where the center of gravity lies in human life, his essentially conservative and just appraisal of conservative, habit-loving human nature, his recognition that liberty takes its meaning from the activities into which people ordinarily put their energies apart from government and politics. Yet he does not offer a philosophy of flabby accommodation to the way things are. First and last, a moral ideal impels Locke's

[44] What is most specifically modern about him, perhaps, is his economic bullishness. As his account of property shows, he was aware of an expanding economy and of the new resources and opportunities offered by the vast American continent. His generally optimistic outlook is in part a function of his sense that the world is looking up, and his emphasis on free contract goes hand in hand with his sympathy with the new framework of economic choice. But Locke never conceived that the emerging economic aggressiveness, for which he was an only half conscious spokesman, might turn Old England upside down. It is ludicrous to read him, as, in my judgment, Professor Macpherson does, as though he was forecasting or advocating the Industrial Revolution or a version of Social Darwinsim. *See* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962).

theory. It is the ideal of individual moral responsibility. God creates each of us with his own separate soul, and God holds each of us equally responsible for what he does with himself and to others. We gain no points for being rich, and we can make no excuses because we are poor. Although he comes to the conclusion from premises different from those of Hobbes, he shares the belief that we cannot in the end escape the privacy, the aloneness, in which we must make our decisions about the social good and our personal obligations to it. But Locke suggests that there is a supreme ethical purpose to the social process, which Hobbes does not.

To be a responsible moral agent is the ideal at which individuals should aim, and it is the purpose at which social institutions should be directed. Locke's social-contract theory cannot be defended, I think, as an account of the logical foundations of the political system. But it withstands the conventional criticisms if it is interpreted as a regulative moral principle, a point of orientation which renders ethically coherent the various institutions of liberal society. It tells us that society's purpose is to sustain the lives of responsible individuals, and that this cannot be done by treating people as though they are children or helpless atoms moving in a field of social forces. Society is not to be conceived as a schoolhouse or a correctional institution or a process of group therapy. Short of obvious excusing conditions like mental incompetence, there should be a presumption in law and morals that human beings act by their own consent and are responsible for what they do. In Locke's perspective liberty has behind it the dynamism of a moral ideal, and that ideal is individual accountability.

C. Hobbes vs. Locke

Well, who is right, Hobbes or Locke? In one sense, they both are. Times and places differ. There are times and places where insecurity and violence seem to loom at every corner, where the organic institutions of society—families, churches, places of work, all the instruments of communication—seem emptied of their power to hold together or to give individuals orientation and emotional support. Hobbes describes the tendencies of human nature in that kind of setting, and it is not surprising that he falls back on the more remote and more formal structures of centralized government and law to keep the peace. In a sense, they are all that is left. Men must do by calculation what nature and history have refused to do for them. In Locke's world, in contrast, an assumption prevails of consensus and mutual deference, of established classes, ranks and orders, of people going about their business without constant distrust and hostility. And certainly there are moments in history and places in the world where such an assumption is in some accord with the facts.

But in a sense, too, both Hobbes and Locke are wrong. Hobbes is obsessed by the extreme case. For all his rationalism, in consequence perhaps of his rationalism, he describes a nightmare. Even in regions where something like Hobbes' state of nature has existed for centuries, it isn't usually a war of each man against each man. We find anarchy attenuated by codes of familial loyalty, and we find people, within these codes, talking of rights and obligations. Locke, on his side, is excessively trusting, I think, with regard to the natural, self-adjusting powers of society to strike a tolerable equilibrium. Though he is seen as a spokesman for reason and for the emerging values of commerce and competition, his perspective conveys no presentiment of the extraordinary dynamisms of science and capitalism and of their unsettling impact on custom and established ways. Still less does he have the imagination of disaster Hobbes had, a conception of what, in a crowded and anonymous society, a relatively small number of morally or politically footloose people can do to spread suspicion and anxiety throughout an entire body politic.

But in considering Hobbes and Locke, the test is not simply one of their descriptive accuracy. They offer perspectives, and a perspective is a recommendation to us for placing our bets. They advise that we stake our lives and fortunes and sacred honor on a particular set of assumptions and strategies because they will yield the best mix of values. Here, I confess, I prefer to stand with Locke. One can see why Hobbes thought as he did and why his perspective draws us: in our time the dangers that obsessed him are also visible. Hobbes' recommendations are those of a man scarred by civil disorder and fearful above all of social breakdown. But one can ruin one's life if, having in mind only ultimate horrors, one organizes one's days to avoid them and treats all other values as luxuries to be considered only if circumstances permit. It is possible to think of choices less extreme than those that Hobbes offers between civil war and undivided sovereignty, between anarchy on one side and law with a constitutionally unlimited province on the other. I do not think we are that far gone in America, not nearly. Social perspectives, we must remember, tend to be self-fulfilling. In some lucky places and times it is not unreasonable to bet on a perspective that offers more moderated choices than those Hobbes offers. No one warns us against the explosive dangers of utopianism better than Hobbes. But that is not a reason to spend our lives with one foot already in the grave because we cannot get the danger of death out of our minds. Hobbes' perspective is that of a state of siege. If we wish something more than a state of siege we will pay our taxes and support the police and take out insurance against the worst troubles, but we will not accept Hobbes' overwhelming emphasis on security.

But we must recognize that if we opt for Locke's perspective and use it to appraise our own situation, there are some ominous implications. If Locke is right, individual liberty and constitutionally limited government are predicated on the existence of vital and intimate social bonds between people. They require psychological orientations and powerful forms of social restraint which can only be supplied by a vital communal life. In our day this requires a more vital and substantive ideal of human equality than his essentially metaphysical conception. Hobbes saw more vividly than did Locke the difference that actual inequality—economic, social, educational—makes with regard to the distribution of both security and liberty in society. Locke sees individuals equal before God, but his outlook is comparatively indifferent to the ways in which practical inequalities affect people's power to participate in the social contract. To give his principle of equality, and his presumption of consensus, substance in our country and century requires a much more active concern with the equalizing of substantive material opportunity than we find in Locke's metaphysical egalitarianism.

And we must also understand why Locke's message has faded for us. Locke's prudential maxims have enduring value, but he presupposed the existence of social conditions which have lost much of their strength. He envisaged a society built around the authority and discipline of the family; in such circumstances the responsibilities of the state could naturally be circumscribed. But now the family is in some disarray. He assumed that people found meaning and dignity in their work. But today alienation from the job is a spreading phenomenon. Writing at a time when the world was moving away from a system of fixed statuses that had held everyone in place, the right of the individual to bargain and contract freely and to create his own system of obligations for himself naturally assumed central significance for Locke. But in our time the movement has been away from contract and back to a status-system—to a society in which the treatment due the individual is determined by locating him in an appropriate social category over which he has little or no choice, such as tenant, consumer, veteran, union member, senior citizen, or member of a disadvantaged group. Not least, private property has an immediacy, an evident identification with the individual's work and daily life, when it is a visible terrain or stock of tools or goods he controls. It is then not simply an economic base for spiritual or political independence but a setting in which the individual can do what he wants, a carved-out sovereignty where a man is his own master. This was the primary image of property that Locke had in mind. But property today is in the main a corporate and collective abstraction represented by an investment portfolio or membership in a pension plan. Ownership and control are separate. Property means wealth and

security, but its connection with living one's daily life under conditions of liberty is less intimate and evident.

Thus, our contemporary life has taken much of the flesh off the bones of the institutions to which Locke's conception of liberty was attached. Liberty, though it remains a value, has lost tangibility in many people's experience. The communal disciplines and the system of deference that held society together and gave liberty a frame have been attenuated, and the institutions that gave liberty its savor and concreteness have receded. And so it is that we find ourselves talking more and more about "law and order," and turning to the administrative facilities of the state for help. We are torn between Locke's perspective and Hobbes' in trying to make our legal system work. We may choose to throw in our lot with Locke's perspective. But plainly we need to add something of our own to the jurisprudence of liberty, to trace out its meaning and limits in terms appropriate to our own problems. And we need to reconceive for ourselves a civic design in which liberty recovers its vividness and persuasiveness in our daily lives.

There is also a task of philosophical and educational clarification to be performed. Locke was a Christian in a committed Christian society. Can his moral ideals, shorn of their basis in a fervently accepted common religion, continue to carry conviction? There are those who will say no, and a full discussion of the pros and cons lies beyond what I can undertake here. It seems to me, in any case, that as a practical matter the issue is foreclosed. The road back to a society held together by a common transcendental religion has been cut off. It was already beginning to be cut off in Locke's day.

But Locke understood, more than did Hobbes, that a society cannot be merely a mutual security pact, that people need a sense that their life together has a meaning beyond the saving of their own skins. This understanding is what gives his modest, earth-bound, common-sense political theory its contagion and elevation. And I venture to think that even without a common transcendental religion such a sense of shared purpose can be found. It lies in the recovery of perspective, in the reformulation for ourselves of the great bet that our political and legal system makes on our capacities and possibilities. A notion of the virtues and felicities proper to us as citizens and moral beings—an Idea of the Good—inspirits that system. The Fourth of July clichés bury it. Our existing institutions often betray it. But if we reflect on what is implied by a concept of limited government, or a Constitution, on fundamental rights, we shall find, I am convinced, that that Idea is there. Or, to put it better, there is an ideal towards which, unbeknownst to ourselves in that state of half-consciousness which we call our practical lives, we aspire. If it can be brought to the front of our minds, we shall not need to look further for a sense of what our common life is about. The task of

uncovering that Idea—of revealing ourselves—falls on philosophers, historians, and poets. But in the American tradition it falls as well on lawyers and teachers of law.

II. Private Rights and the Public Good

Having explored the landscape of liberty from two different perspectives, let us now move closer to the central question before us. Is there a way of determining where liberty properly stops and public compulsion properly begins? I wish to discuss this problem in one of the principal forms in which it presents itself—"private rights" and "the public good." The arguments that go on about these ideas and about the discordant human claims for which they stand are close to an obsessive motif of contemporary political, legal, and jurisprudential debate in our society.

Consider familiar problems around which angry controversy rages daily: the rights of individuals to engage in conduct regarded by large parts of the community as indecent, immoral, or simply very irritating; the rights of individuals, engaged in activities whose direct consequences seem harmful only to themselves, to be let alone no matter how much harm they are doing to themselves; the rights of people in local areas to resist urbanization, down-zoning, or the bussing of children to promote school desegregation; the rights of people to be parents as often as they wish, regardless of population pressures; the rights of individuals and groups who believe themselves victims of intolerable injustices to disobey the law; the rights of public service workers to go on strike; the fundamental problem, of which both civil disobedience and public service strikes are marginal examples, regarding the limits within which corporations, labor unions, professional organizations, and other powerful groups vested with private rights should be required to behave.

The list, plainly, could be three times as long. It suggests that the issue of "private rights" and "the public good" is a central and urgent one. I cannot, of course, deal with the specifics of all the problems that illustrate it, but I shall try to suggest a general framework for considering them.

A. Private Rights

The first step is to examine the word "right," one of the most conspicuously troublemaking words in the language. It is systematically ambiguous in the meanings people attach to it, and yet it is at the same time a fighting word, used when someone is demanding strong moral and political medicine. As with other crucial moral and political words, people may have trouble saying what they mean by "right," but this does not deter them from knowing or saying that they ought to die, and

may have to kill, to protect what the word designates.

Thus, when a man uses the word "right" in the adverbial or adjectival sense, saying, for example, that he believes he is doing the right thing, he usually means to say something more than that he is doing something which is for the best. He means that his action is in conformity with an important principle, and that convenience, expediency, even a solution to the particular problem at hand that would make everyone happy, must all be sacrificed if the principle requires it. The "right" decision, like the right answer to a mathematical puzzle, is not simply the best solution: it is the only one.

Similarly, if someone using the word "right" as a noun says that he has a right to do something or to receive something, he normally means to say that he need give no further reasons for doing it or receiving it, that other people are wrong to get in his way, that they ought in fact to facilitate his attainment of what he desires, and that there are really no grounds for compromise, concession, or bargaining. A right is not subject to being annulled or even trimmed except when it conflicts with other rights.

Claims that we have rights would thus appear to be incitements to battle, limitations on social planning, invitations to turn social problems into theatres for moral disputation. It is not to be wondered, therefore, that philosophers like Hobbes, who have put peace high on the calendar of social virtues, have looked with a jaundiced eye on the language of rights and have been inclined to think that claims of rights should be strictly limited and never honored at all except when embedded in a determinate system of positive law. What are the social and intellectual functions of this concept of rights; what is the rationale for employing it?

Let us begin by taking a closer look at the various meanings of the word "right." Two principal senses can be distinguished.[45]

First, we often use the expression "to have a right" to mean that there is no relevant moral norm or legal rule under which one has the duty not to do or have what one specifically proposes to do or have. The policeman asks me what I think I am doing walking on the grass in the park, and I say that, in the absence of any "Keep Off the Grass" sign, I have a right to walk on the grass. To have a right in this sense means only not to be under the pertinent restrictive duty.

Probably it would be better to use the expression "privilege," as Hohfeld suggested,[46] or the word "liberty," as Glanville Williams has

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[45] In what follows, I lean heavily, as will be evident, on the writings of Wesley Hohfeld and Hans Kelsen.

[46] *See* W. HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 37 (W. Cook ed. 1923).

recommended,[47] to designate this wholly negative conception of a right.[48] For when we use the word "right" in this way we use a strong word for what is in fact a weak claim. The premise, "I have no duty under the law to refrain from addressing this club meeting," does not automatically imply the conclusion, "I have a right under the law to address this club meeting." The law permits me; it does not entitle me. To make the slide from one to the other is to presuppose the general principle that what an individual is permitted to do he is entitled to do. But this by no means follows from the notion of "right" as such. It comes from a separate assumption unconsciously compressed into that notion. If you and I see a wallet on the ground we are both at liberty to pick it up. In the weak sense we have a "right" to do so because there is no law telling us we may not. But if you manage to pick it up first I cannot claim damages against you for denying my right to the wallet. I had a liberty or privilege with respect to it, not a right in the strong sense of the term.

The law of freedom of speech is also illustrative. I have a liberty to speak in the sense that the law imposes no duty of silence on me, short of avoiding defamation, public indecency, and the like. But as against other private individuals who may wish to heckle or interrupt me so that I cannot go on speaking, I have no legal rights. I may not sue them for damages, or ask the police to intervene, or get an injunction against them. (If I can do these things it will be because I can attach their interference with my speech to disorderly conduct, infringement on my property rights, assault on my person, or on something other than the direct and simple interference with my liberty to speak.) My *right* to speak, as against simply my liberty to speak, is a right, in our system of law, only against the state and its officials.

Of course, whether it would be better to substitute some other word for "right" when it is used in its loose sense is a question which probably has more meaning theoretically than practically. People will go on using the word "right" as they are habituated to use it whether or not philosophers sniff nervously at them when they do. The technical language of the law, to say nothing of common speech, is shot through with ambiguities and inconsistencies in the use of words like "right," "liberty,"

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[47] Williams, *The Concept of Legal Liberty*, 56 COLUM. L. REV. 1129, 1142-45 (1956).

[48] Indeed, it involves a double negative—a denial of a legal duty of negative content. It will be found that the same analysis holds for every other sentence asserting a liberty to do something.

> Such an assertion is in reality a *denial* of duty *not* to do the thing in question. This is perhaps a unique phenomenon in our language. Several other words conceal a single negative behind an apparent positive, *e.g.*, "black," "cold," "heathen," "alien," "layman." "Liberty" goes one better; it manages to conceal two negatives which are logically independent of each other.

Id. at 1136.

"power," "immunity," and "privilege."[49] Perhaps the best that can be hoped is that analysts of issues related to rights be as clear as they can be about the difference between the first use of the term "right" and the second. For as these examples may suggest, the expression "to have a right" is also used in a much stronger sense, and it is the unconscious slip from one to the other that makes the use of the expression in its weak sense dangerous.

I have signed a contract with you to pay me $100 on the delivery to you of a manuscript. I deliver the manuscript; I have a right to the $100; you have the duty to pay me. And my right is simply your duty. In fact, I do not need the word "right" at all to describe the relation in which I stand to you. It can be completely described simply by listing your duty to me, along with the duties of others, particularly officials designated by the law, to assist me in seeing to it that you do that duty. Max Radin has suggested that the first kind of right be called a "privilege-right" and this second, stronger kind a "demand-right."[50] The reason, obviously, is that in this stronger sense of the term "right" we are making claims on other people's behavior. We are, indeed, talking more about others than ourselves. It is *they* who must do or omit certain actions; we are merely the beneficiaries and the claimants. This is different from "privilege-rights," like taking a walk, eating four meals a day, or daydreaming, which require no mention of others' duties.[51]

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[49] Moreover, the locutions which are recommended, like "privilege" and "liberty," to take the place of "right" in this weak sense, present their own problems. "Privilege" carries the connotation of special provision for a selected category of people; "liberty," when used to mean only the absence of the pertinent negative duty, has the paradoxical implication of leaving out the connection, implied by ordinary uses of the term, between liberty and choice. In the sense here at issue, I may have the liberty to pay my restaurant bill, which is simply to say that I have no legal duty not to pay it. But I can also have a *duty* to pay it, which means that I have no choice. *See* Williams, *supra* note 47, for a discussion of these points.

[50] Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141, 1149 (1938).

[51] The dangers of confusing the two meanings of "right" are illustrated by an amusing case in British law Chaffers v. Goldsmid, [1894] 1 Q.B. 186, which was decided in 1893. Englishmen have been taught to believe that they have a right to petition Parliament for redress of their grievances. The plaintiff sued his representative in Parliament for damages for refusing to present his petition to Parliament, and for a mandamus requiring him to do so. The plaintiff discovered, at some expense, that his "right to petition Parliament" was a liberty, a privilege-right, not a demand-right. No law forbade him. He was not in contempt of Parliament for submitting a petition; the petition had an absolute privilege in libel; there were regular parliamentary procedures by which petitioning was made possible. But the plaintiff could not make his Member of Parliament pass the petition on. The latter had no duty, the courts found, to do so.

It may be that we cannot expect language to be used more clearly than it is. Still, the plaintiff's confusion about what the birthrights of Englishmen meant cost him the pain and money of litigation, and this confusion can hardly be said to have been his fault.

There is, however, sometimes a special twist in this second meaning of the term "right." All rights, in the second, strong sense, are other people's duties. Many rights are exhaustively describable in these terms; the word "right" adds nothing at all to what we are brought to understand by a description of the duties of the relevant individuals. My right to be secure from physical assault, for example, is nothing more nor less, legally speaking, than other people's duty not to assault me. However, there are some rights which, though describable in terms of other people's duties, also have a special technical meaning.[52] They are "rights" because the individual who possesses them has the authority to put into effect or to suspend the rules that define them.

A right, in this special sense, is not simply a protected claim, definable in terms of the legal duties others have. It is a portion of the law which, as it were, belongs to the individual designated as the possessor of the right in question. For it is up to that individual to activate the norms and sanctions that demarcate that right. Thus, if I make a contract with Jones and then fail to pay him the fee I promised, although he has done everything he has committed himself to do, it is entirely up to him to decide whether to call on the law to enforce the contract. Although the failure to keep promises is a matter, surely, of interest to the entire society, and though it could be treated, like theft, as an offense against society as a whole, a legal system which recognizes private rights leaves the option of enforcement or nonenforcement of this and other legal duties to particular private individuals.

To make the distinction plain, let us take as an example the case of assault. If Sadist assaults Masochist, and Policeman Sam Protector witnesses the event, he has the legal duty to arrest Sadist, who has violated his duty not to assault Masochist or anyone else. Masochist, in this sense, has the right not to be assaulted. But Masochist has no right in the special sense of the term here at issue. He has no control over the institution of legal proceedings against Sadist. The case is between the People, or the State, and Sadist, who has broken the criminal law. It is not within Masochist's option that Sadist not be prosecuted. Of course, Masochist, when called as a witness, may decide to give testimony that leads to the dropping of charges against Sadist. But that is not the same thing as Masochist's option to bring a civil suit for damages against Sadist. He is free to do so or not to do so; he has, in respect of tort law, a right which he does not have in respect of the criminal law.

It is possible to think of a legal system constructed quite differently,

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The pain and money were a tax, falling randomly on him, for the slovenliness of political and legal language.

[52] *See* H. KELSEN, GENERAL THEORY OF LAW AND THE STATE 58-62 (1945); Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, in WHAT IS JUSTICE? (1960).

in which no one possessed any rights in this sense except a class of persons specifically designated as lawgivers empowered to institute, apply, or suspend legal rules. Under such circumstances, all breaches of the rules would be offenses against the State; the procedures of civil law as we now know them would be annulled. One of the consequences of having a system of extensive private legal rights is that participation in lawmaking is broadly distributed in the population. A right so understood is a ticket of access to the managerial level of the legal system: to the extent that one has such rights one is not merely a consumer but a producer of the law.

B. The Public Good

These considerations, I believe, throw our topic, the relation of private rights to the public good, into a fresh light. If the analysis I have offered is accepted, the conclusion follows that private rights are *public* in at least three well-established meanings of the term.

They are public, first, in that they are protected by collectively supported legal institutions: by taxes, policemen, officials, the machinery of the state. It is not true that my having a private right is my business alone. There is a social investment in it; and it seems reasonable to ask, therefore, what society gets out of it.

Second, private rights are public in the sense that they incorporate distinctive social relations; they represent forms of control by one individual over other individuals' behavior. One man's right is another man's duty or restraint. Since most of our most important liberties are rights, it is therefore misleading to describe a system in which liberty is prized as one in which restraints are fewer. To speak of a "free" society is, crucially, to speak of one in which *certain selected liberties* are protected, or, in other words, one in which certain kinds of restraint are distributed in certain kinds of ways.

Third, private rights are public in that, if the terms of this analysis hold, the line fades between the rights accorded by so-called "private law" and the rights accorded by so-called "public law"—namely, political rights. A political right like the right to vote guarantees access to the lawmaking function; a private right, like that of recovering damages from a manufacturer for his negligence, confers a similar, though more individualized, access to the lawmaking function. The function of private rights, like the function of political rights, is to reduce public officials' control over the lawmaking process. It makes private citizens agents of the public process of lawmaking.

In a society in which there are private rights, we are thus confronted with what, at least on the surface, seems to be a puzzle. We are dealing with rules that are public in their operational meaning and conse-

quences. Yet, they seem also to be rules which collide with the notion of the public good in at least two ways.

First, to speak of having a right is to announce that one does not need to look at consequences. Shylock has a right to his pound of flesh and he will have it; what Portia asks, it will be recalled, is not that he be just but that he be merciful. Second, rights fall into two classes, fundamental and functional. A professor considering the promotion of a junior colleague has the functional right to ask him about his scholarly plans. But he does not carry this right out into the streets where he can make similar demands on every passerby. His right is in his office or function, not in him as a person. But his right not to testify against himself or to practice a religion or to marry any competent person of the opposite sex whom he chooses goes with him everywhere. His fundamental rights are his by virtue of his general membership in the legal system and not in consequence of some particular performance in which he has engaged, like signing a contract, or of any specific office or profession into which he has entered.

Thus, "private rights," though public, seem to be doubly immune from public scrutiny. First, they may be exercised without producing any reasons. As a permit to do something, one merely has to show that one has a *right*, and that is enough. Second, the most important of these rights are individual, not functional. One claims the right by invoking a general rule, but this rule seems not to be subject to appraisal in relation to a clear and identifiable function. We can understand why a doctor should not be compelled to testify against his patient: the practice of medicine would be seriously embarassed. But why, it may be asked, should it not be held as presumptive evidence against a man that he does not take the stand in his own defense in court? The values that are relevant to the answer to this question are not as easily circumscribable as in the case of clearly functional rights.

Our discussion thus brings to the surface a state of affairs which I have known from personal experience very greatly to perplex visitors from countries that take a radically different view of the relation between law and the individual. At considerable expense to all of us in money, pain, frustration, ugliness, discord, inefficient government, and the daily frustrating sense that injustice is afoot and there ought to be a law, our society maintains the principle that individuals, short of the most extreme necessities, ought to have protected spheres of activity, and ought to have them no matter what they do with them. Private rights, maintained by public force and empowering individuals to shape the public force, apparently define a sacrosanct area within which the public force may not intrude, and considerations of the public good are relevant, if at all, only in the last extremity.

Moreover, almost everyone I know, myself included, holds this view in some form, and usually holds it passionately. There is disagreement, to be sure, about which rights should be on the list. Some think that property deserves more consideration than it has been receiving; others think that the little lady from Peoria who is a victim of psychic aggression when she walks past the marquees of the theaters on 42nd Street has not been getting the legal protections to which her rights entitle her. But almost all of us agree that there are some rights which no government ought to infringe except under the pressure of clear and present danger, and other rights which ought not to be impaired even then. What, then, is the basis for drawing this line between the private rights of individuals and the public good?

We do, after all, draw the line confusingly. In the 19th century it was said of the Germans that they would accept the most constraining forms of government control but would rise in arms if the price of a glass of beer were raised 2 cents. Similarly, we Americans apparently think that a tax on church property is an unjustifiable infringement on the private right of religious expression, but we do not think a tax on theater tickets is an unjustifiable infringement on the private right of artistic expression. Is it possible to produce any basic philosophic premise which can explain why these puzzling distinctions are made, and perhaps help us to correct the faulty ones?

I think not; but I shall try to show that my reasons for thinking not also give some positive assistance in dealing with the question.

C. *An Attempt to Distinguish Private Rights and Social Good*

I shall consider here only one historical figure who has made the attempt to find a basic principle for such distinctions. Fortunately, however, he is a pivotal figure, and his argument is an amalgam of a variety of positions. I have in mind of course, John Stuart Mill.

1. John Stuart Mill: *On Liberty*

Mill's classic essay, *On Liberty*, was the effort, in his words, "to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control." In Mill's well-known words,

> That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[53]

[53] J.S. MILL, ON LIBERTY 15 (World's Classics ed. 1912).

2. Natural-Rights—Social-Contract Doctrine

There is, I believe, not one line of argument, but three quite distinct ones which Mill adopts to support this conclusion. Though Mill himself says that he foregoes "any advantage which could be derived to [his] argument from the idea of abstract right as a thing independent of utility," the first line of argument is, I believe, the classic natural-rights social-contract argument in a ghostly form.

In this argument, social obligations are to be understood as instruments for the advancement of the individual's antecedently defined interests—interests he brings with him, as it were, into the social arena. And since individuals' purposes sometimes collide, society must guarantee equal protection of certain basic interests for all individuals. Any other distribution of burdens and benefits will leave a residue of injustice. It is out of these considerations that, in the classic social-contract theory, the notion arises that every individual is to be accorded certain basic rights. Either they are seen as inherent in him, bestowed by the Law of Nature, or else they are viewed as rules of reason whose necessity people recognize when they look at matters fairly. From such a point of view there will be a mutual understanding that all should possess a bounded and protected private preserve, and that no intervention by society into the preserve is justified. Civil society exists to serve specific purposes. When it goes beyond those purposes, it invades a preexisting domain of individual liberty where it has no business being.

In Mill's argument, despite his utilitarianism, the assumptions of this natural-law social-contract doctrine are, I believe, detectable in the way he initially formulates the problem. He speaks of social "interference" with the liberty of action of individuals. Given another philosophical premise than that of the individual fully endowed with his preexisting complement of claims, he might well have used terms like "orienting," "directing," or "cultivating," rather than the opprobrious term "interference," to describe the process of social control through law and moral suasion. Again Mill takes it for granted that the exercise of power over the individual is a process that needs to be justified. But why? Neither Plato nor Aristotle, to take two not unimportant examples by way of contrast, begins the analysis of social authority in this manner. For them the primary question is not, why should anyone have authority over anyone else? but rather, Who should have authority over whom? They do not take the autonomous individual, as Mill does, as a starting point for analysis, and discuss society as though it were put together out of such individuals; nor do they treat the autonomy of the individual as an ultimate ideal to be generally protected. They take families, class, cities to be loci of prima facie obligations. The principle of preexisting individual autonomy is not one that Mill or his Benthamite predecessors

logically derived from the general theory that utility is the test of social policy. It is one that they fed into the theory.

3. Natural Rights Theory

The origins of this notion, both historical and logical, are in natural rights theory. Indeed, the shades of the allied Natural Law belief in the antecedent Harmony of Nature also linger in Mill's analysis. When may one man interfere with the next? Only, says Mill, in cases of self-protection. But in a less than perfect world, when one man has more than he should have and the other too little, *any* action to change the balance, including the effort to change one another's moral outlooks, can be construed as an act of self-protection. As Mill's great and too easily dismissed adversary, James Fitzjames Stephen, remarked,

> Mr. Mill's principle . . . assumes the existence of an ideal state of things in which everyone has precisely the position which, with a view to the general happiness of the world, he ought to hold. If such a state of things existed there would be some plausibility in saying that no one ought to interfere with anyone else except for the sake of protecting himself against attack, by maintaining the existing state of things. But as no such state of things exists or ever yet existed in any age or country, the principle has at present no *locus standi*.[54]

It is difficult, indeed, to find an action so wholly individual and self-enclosed that no other individual is possibly affected. How much time one gives to sleep affects one's health and energy, which affect one's work, which affects other people; what one reads in the privacy of one's home affects one's tastes, which affect one's companions. And if we can imagine any act wholly evanescent, inconsequential, unremembered, and unmemorable, would it not be, in a poor and wasting world, a flagrant misuse of time and an abuse of social resources? The line between "private" and "public" cannot be the line between what affects other people and what affects oneself alone. It is not a discovered line but a social construct. Not that it is arbitrary, or that no line should be drawn between the public and private domains. But the line is not to be found in the way we find the line of a stream through a forest. It is more like the line between two countries; it is drawn, not found, and it is drawn for specific reasons. It is conditioned by historical interests and cultural biases and represents a kind of compromise among a variety of considerations and claims. And there is almost always room for argument that it could have been drawn a little further in one direction than in the other.

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[54] J.F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 66 (2d ed. 1874).

Indeed, the pitfalls that beset the identification of a clear domain of private rights are, or should be, well known. The natural right of women to do any kind of work that men do—*e.g.*, working 14 hours a day pulling trolleys in mines—was long recognized by the law; then there was an interval when such a refusal to recognize sexual differences was considered unnatural;[55] now it is once again being reasserted that distinctions based on sex are an invasion of women's human rights. The idea of preexisting rights gives us only algebraic formulas. The actual content of these rights has to be supplied by drawing upon changing practices and customs or our own personal values and aspirations. Speaking of the practical consequences people deduce from the abstract doctrine of Natural Law, Justice Holmes once wrote,

> I remember a very tenderhearted judge being of the opinion that closing a hatch to stop a fire and the destruction of a cargo was justified even if it was known that doing so would stifle a man below.

Our discussion of preexisting individual rights may properly stop here with Holmes' further remark:

> It is idle to illustrate further, because to those who agree with me I am uttering commonplaces and to those who disagree I am ignoring the necessary foundations of thought. The *a priori* men generally call the dissentients superficial.[56]

4. The Utilitarian Approach

Mill's second kind of argument, the utilitarian, is not more successful, I believe, in supporting the principle that society may not interfere with the individual except in self-protection. It stumbles, to begin with, over the vacuity of terms like "harm." If I profess an idea that deeply disturbs 90 percent of the people who ever hear of it, have I not done them harm, at least from the point of view of a utilitarian calculus? It is true, as Professor H. L. A. Hart, a latter-day defender of Mill's utilitarian liberalism, has pointed out,[57] that if society were to operate on this principle no offensive truths would ever be permitted an airing. Nevertheless, in terms of a classic hedonic calculus, or in terms of some averaging or aggregating of subjective utility scales, I am unable to say what is wrong with this consequence. To say that society would have to pay, in the currency of subjective utilities, "in the long run" is only to put off the problem of invoking some independent moral standard, if

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[55] See the "Brandeis brief" and the majority opinion in Muller v. Oregon, 208 U.S. 412 (1908).

[56] O.W. Holmes, *Natural Law*, in Collected Legal Papers 310, 314 (1920).

[57] H. Hart, Law, Liberty, and Morality 45-48 (1963).

only to determine how long "the long run" should be. We need something else—a set of criteria (as Mill recognized in *Utilitarianism*) that allow us to make qualitative distinctions, for example, between higher and lower values. Utilitarianism is incomplete, in brief, without antecedent moral commitments.

The other part of the utilitarian argument as to private rights seems to me, similarly, to fall to the ground. Let us assume, as Mill did, that coercion is a negative value, a source of pain. There are obvious and frequent cases where this assumption is false, but let us subscribe to it for the purposes of argument. Nevertheless, as we have seen, the most significant rights usually require the institution of systems of extensive restraints. On purely utilitarian grounds there is no initial presumption in favor of rights, for restraint is written into the meaning of rights.

D. Balancing Private Rights and Social Good

There is, however, a third line of argument. Mill's other lines of argument obscure it; his effort, particularly, to lay down one "very simple principle" leads to the misleading appearance of a position modeled (unsuccessfully) on a mathematico-deductive model. The considerations he puts forward that I find most persuasive, however, are of another form: they are of the classic balancing type, in which various and competing considerations are weighed against one another. Mill himself, in *On Liberty*, indicates the presence in his position of something quite other than standard textbook utilitarianism: "I regard utility as the ultimate appeal of all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being."[58] It is an idea of man as a progressive being that stands in the wings as Mill's discussion of liberty unfolds. I take it that he does not mean Man whose historical destiny is to illustrate God's logic or fill out His Idea. He means a being who, in his collective character as a participant in civilized activities, develops and articulates ideals, criticizes and rectifies them, and attempts to move toward them.

In any case, if this is not Mill's intent—though I think it is—it is mine. In what follows I want to sketch out the considerations which, I believe, play a part in helping us to draw in a reasoned manner the line between private rights and the public good. What I say is not, for the most part, to be found in Mill, except implicitly. But I should like to believe that it is in the spirit of his ideas and tradition. It is a filling-in of that notion of man as a progressive being which is implicit in liberal civilization.

Rights are the logical consequences of the institution of rules that

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[58] J.S. MILL, *supra* note 53, at 16.

leave with private individuals the option to demand performances from others and that leave these individuals free to exercise these options without giving further reasons other than that such rules exist. What, then, establishes the validity of such rules? An examination, I believe, of their consequences with respect to certain long term aspirations and values of the society provides an answer. With respect to our historical commitment to private rights, I suggest that there are, cabalistically, seven of these values. Perhaps there are more, but the seven I shall name seem to me to cover a good portion of the issues that confront us in determining private rights. Specific private rights, of course, are not to be neatly categorized under one and only one heading. They often serve several values, and sometimes these values are in conflict. This is part of the reason why specific rights become problematic and need to be redefined. In listing these seven values, I would also emphasize, I do so in no particular order. I am not sure that there is a fixed order of preference among them. The need to balance and reorder them in different contexts is precisely what makes the preservation of liberty and private rights a matter for intelligence and imagination and not merely for brute courage.

(1) One value is what Montesquieu called "political liberty." Probably it is less misleading to a 20th-century audience to call it either "security under law" or, in the honorific sense, "the rule of law." Montesquieu, in language reminiscent of both Hobbes and Locke, describes this value as follows:

> A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits . . . .
>
> The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another . . . .
>
> Political liberty consists in security, or, at least, in the opinion that we enjoy security.[59]

I take it that Montesquieu is describing the security of expectations which social authority provides only to the extent that there are clear and general rules, strictly limited in the interpretations that can be placed upon them, which are promulgated in advance of people's actions. This is a necessary condition if people are to be able to make long term intelligent life plans for which they can reasonably be held responsible. To be ruled by the arbitrary, to be the subject of decisions taken

[59] 1 MONTESQUIEU, THE SPIRIT OF THE LAWS Bk. XI Chs. 4, 6; Bk. XII Ch. 2 (T. Nugent transl. 1949).

without a general principle to justify them, is to live in fear and to have the conditions for reasonable and voluntary choice annulled. Private rights, among their purposes, serve as a corrective to the gravitational tendency in human society toward the arbitrary. In Montesquieu's words,

> Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power. But, constant experience shows us that every man invested with power is apt to abuse it . . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.[60]

(2) But there is hardly any value, as Aristotle noticed, of which it is not possible to have too much. A perfected law, with all the i's dotted and all the t's crossed, which covers all possible future contingencies, assimilating them automatically to past cases, is impossible; and if it were possible, it would be stifling. No idiosyncrasy, nothing with a vitality of its own, would be in a position to assert its claim for recognition. In Aristotle's words,

> all law is universal but there are some things about which it is not possible to speak correctly in universal terms . . . . And this is the very nature of the equitable, a rectification of law where law falls short by reason of its universality.[61]

Private rights serve this Aristotelian cause of equity, the corrective of formal justice. They register the social recognition of the fertility of nature, of its extraordinary powers of individualization, and of the limitations of human beings in keeping up with it. A justifying assumption on which they rest is that a legal and institutional system that spreads autonomies is better designed to create a setting for human life and work that has an individual fit.

Liberty in society depends, on one side, on the establishment of uniform laws, applicable impartially to all; it depends, on the other side, on the pluralities, experiments, and diversities that allow different people to find their own different ways. The constant tension between these two poles, and the difficulty but necessity of accommodating their joint claims, is illustrated by the centralizing and standardizing tendency of Supreme Court decisions on school desegregation and by administrative decisions of the federal government on the hiring of minorities. Without a system of rights centrally established and enforced, individuals in many fields would undoubtedly be subject to arbitrary discrimination.

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[60] *Id.*, Bk. XI, Ch. 4.

[61] ARISTOTLE, NICHOMACHEAN ETHICS Bk. V, Ch. 10 (M. Ostwald transl. 1962).

With such a system of centralized enforcement, homogenizing tendencies take over.

(3) A third value incorporated in the concept and practice of private rights is that of the pursuit of truth. It is important that this value, and the requirements for the respect of private rights which it imposes, not be confused with other values and their requirements, which are also important but different. Justice Holmes, in a celebrated opinion, wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[62] If he meant these words literally, one need only look at the contents of the average newsstand to refute them. What counts in the market is money and popular tastes, neither of which is a touchstone of truth.

The negative point that Holmes makes, however, is valid: the truth of an idea is not tested by government's opinion of it. The truth of an idea is tested, in the end, by competent critics and observers, specially trained and selected by those already accredited as competent critics and observers—in short, the non-political, professional community of scholars and scientists. And the rules by which this community performs its functions cannot be identical with the rules of the society at large. It is a fallacy to believe, for example, that universities ought to offer a spectrum of all existing ideologies.

A system of private rights makes the autonomy of such a community possible. Indeed, it makes possible the autonomy of other professional communities entrusted with key social values—for example, lawyers and doctors. The "truth" of which I speak has its siblings—justice, health, human welfare, and the like.

(4) Once again, a certain balance is needed. Professionalism easily becomes pedantry, a rationalization for the exploitation of laymen, or a collection of insular prejudices and abstractions. To correct this, and, more broadly, to control the exercise of power generally in the society, another requirement emerges as a long term value—the competition of political interests. The "marketplace" to which Mill's and Holmes' doctrines properly apply is the *political* marketplace. Freedoms like speech and association, in that marketplace, are justified on the ground that they permit an open competition for power and a public control of the exercise of power.

It is when we see freedom of speech as an arm of vigorous political competition and not as an instrument for the pursuit of truth, that we can understand the latitude it is given in our courts, and the difficulties that American law puts in the path of any public official seeking redress for what he considers libelous personal accusations against him. Behav-

[62] Abrams v. U.S., 250 U.S. 616, 630 (1919).

ior quite out of place in a university may well be necessary and desirable in the political arena—though it should be added that in the political arena there are limits, too. The open competition of interests depends on civility and, in the broad moral sense of the term, parliamentarism. These are liberty's spine.

(5) Closely allied to the interests of political competition are the social values of entrepreneurship and innovation. The degree to which the economy should be based on decisionmaking by private right depends on one's estimate of the relative efficacy of decentralized as against centralized decisionmaking. This "efficacy," further, has to be measured with respect both to economic purposes and to the general diffusion of power in society. The matter is complex, and not entirely a matter simply of competing *Weltanschauungen*. Factual issues are involved, and very probably the answer differs from country to country and period to period.

Economic entrepreneurship is not, however, the only kind of inventiveness which society encourages through a system of private rights. Artistic creation is also a beneficiary of such rights. Tyrannies have often nurtured extraordinary works of architecture, painting, music, and drama. They have rarely done so, however, if artists have not possessed either a certain quasi-professional standing or aristocratic patrons—and, thus, certain de facto private rights. It is such artists, endowed with this special status, personages not merely persons, who are the principal source of the modern ideal of moral and esthetic individualism. They belong, I think, to the same family as the great business entrepreneurs, the creators of their own names, the founders of great houses. This kind of ambition, this image of human possibility, is favored by the doctrine and practice of private rights.

(6) Clearly related to this value and yet rather different from it is another—self-expression. The man or woman who has a statement to make, who wishes to wear his or her religious creed, moral outlook, or sexual identity out in the open where everybody can see it, is not necessarily an ambitious artist. Nor is he or she necessarily trying to make a dollar or win a vote. We have here, I think, a value close to the value of simple individualization, of having a small piece of the world tailored to one's form. But it is more assertive in its quality. It is, probably, the democratization of the value of artistic individuality. It is easy to sniff from on high at this value, but its importance in a society of mass production and consumption and of urban anonymity cannot be easily exaggerated.

(7) Still, it is a value that can easily be overdone. Self-expression can flow into an expression of scorn or hostility; the assertion of one's own authenticity often invades the privacy of others. The balance to self-expression, and perhaps the most precious value of all, as Brandeis

thought, is privacy, the simple chance to be let alone. The function it serves, the long term social interest it represents, is a complex of basic goods: family, free friendship, love and personal communion, solitude and self-confrontation, religious or philosophical integrity, the intimacies and intensities that are only possible for rational people when they can choose their company and keep the prying world away.

E. The Conscious Self: A Resolution of the Conflict Between Private and Public Interests

This seventh value reveals most clearly the moral aspiration, the commitment to an ideal of personality, which runs through a system of individual rights and gives a kind of family resemblance to the several values that underlie it. It is the ideal of the conscious self, mobile, transcending any particular social role, objectified for itself so that it is its own critic, defining itself through its choices. A liberalism like Mill's is pluralistic; but it does not hold together, I believe, unless it contains a preferred model of human excellence. The conception of the self here described is, I think, that preferred model. The self that transcends any particular role, that is not wholly submersible in class or religion or cultural group, is the prerequisite for the hope that a public interest can emerge from the conflict of private interests, that there will be a spirit of accommodation and communality in the air. The self which has choice forced upon it, the self which, by pressure of circumstance, is forced to be free, has, in addition, the opportunity to be critical. This self is the prerequisite for the maintenance of the institutions of self-appraisal on which a liberal polity bases its claim to legitimacy.

This ideal, to be sure, can be turned into something grotesque. There is abroad in our society today a view that the only norm that an individual should accept for his guidance is the norm of being independent of all norms inherent in his social roles. He becomes "inauthentic," it is suggested, when he allows his personality to be cut into pieces, a bit of him a worker, a bit a parent, a bit a citizen, a bit a man or woman. This view confuses an absence of social identity with a discovery of self. Even the purest self-expression, if it is to be *ex*pressive, must meet some public standards of communicability. To keep a core of principle and purpose intact in a variety of roles, and to judge what one does in these roles in relation to such principles and purposes, is independence; to seek a quintessential self, floating about with no links to the world, is to mistake solitary confinement for freedom.

Even when the ideal of the conscious, independent self is not stretched this far, it can still be misapplied. The ideal of an independent personality, critical, mobile, never wholly absorbed in or defined by its environing web of circumstances, is one that probably nobody can achieve constantly, and perhaps only a minority can approximate as a

general rule. If such an ideal of personality is construed as a standard imposing requirements on everyone, it can generate stereotyped caricatures of individuality on one side and widespread feelings of failure and self-contempt on the other. Educational, psychiatric, and political doctrines preaching the goal of moral and intellectual independence, universal, complete and constant, are prescriptions for self-deception. They lead to that parody of individuality in which people en masse adopt a certain convention in dress, speech, and manner to show their independence of convention.

It is useful to distinguish in morals and in law between norms that are mandatory and norms that are advisory and orientive. The law may permit gambling, but it may show its preference for other social occupations by refusing to enforce wagering contracts. It may not require people to marry, but it can offer encouragements to those who do. Similarly, the ideal of personality that underlies the structure of private rights which liberal societies have developed is best understood not as a command to all but as a guide to the formation of social policy—an indication of what should be specially prized and guarded. It is not to be supposed that most people, at any time and in any place, will seek the values of disengagement, skepticism, and personal choice. But a liberal culture must do what is necessary to see that it has a saving proportion of people who do seek such values.

We come, then, to a kind of answer to the question we have posed—the relation of private rights to the public good. The answer I would suggest is that the considerations I have discussed define some considerable portion of the public good as it should be understood in liberal society. We make the best sense of what we are doing in our kind of society when we see that the line we draw between the private and the public is drawn, in the end, for the sake of perpetuating and embodying a complex ideal of civilized life. The problem of private rights and public good turns out to be that of weighing different social values, involving different aspects of liberty, against one another and of constantly readjusting the relations among them. And of course there are other values—for example "equality," "fraternity"—against which the considerations I have mentioned must also be weighed.

F. A Practical Test of Private Rights with Regard to Public Good

A final question must briefly be considered. Although the effort to find "one very simple principle" on which to build the edifice of private rights has a powerful philosophical tradition behind it, it is, I have argued, a misdirected effort. Inevitably the question arises: What is the basis for that complex of values and that ideal of personality to which, in my view, the conception of private rights is attached?

They are tested, I believe, by their fit with other values we cherish

and by their capacity to guide practical decisions to results compatible with these values. I gladly admit, speaking for myself, that I do not derive these values from *a priori* principles. Nevertheless, I do not think myself a creature of caprice in hitting upon them. I have not "hit upon them"; I have found them when I have looked for the roots of my being and for the integrating principles of what, in our society and our society's past, we regard with the greatest pride.

Why be committed to these values? Homer noted that the Achaeans were different from other people: they never bent their knee to any man. They expected reasons to be given for their loyalty, not mere commands. That aversion, that impulse, extended and deepened, is what we preserve in the modern notion of private rights. A great deal of history, a great deal of blood, has gone into the nourishing of it. We know the cheapness, vulgarity, banality, and cruelty of the social systems which in our time have denied the values that private rights serve. These private rights are threads in the fabric of our moral system so placed that if we pull them out we cannot be sure what will be left. All that is clear is that we will look with shame on what remains.

III. Communal Freedoms and Individual Rights

A. Individual Rights Within the Community

Our discussion in this concluding essay best begins with a backward look towards Thomas Hobbes and John Locke. Hobbes, it might be said, is the lawyer's philosopher. I do not mean that lawyers must share his preference for absolute government. But Hobbes saw law as the indispensable repair shop of society when its other institutions of discipline have failed. He expressed the instinct, perhaps more trenchantly than anyone before him, to turn to law and the courts to settle disputes, render people's expectations secure, and control social change.

In contrast, Locke was more equivocal. He saw men and women functioning in a thick web of personal relations and natural associations, and not only as individuals under a pact of obedience to the State as the ultimate arbiter. It was precisely this equivocal posture in Locke that permitted him to serve as the successful but moderate modernizer of the British political tradition. He said what needed to be said to free that tradition from the attitudes and values of a patriarchal society. He made his limited case for parliamentary rule, free contract, and individual choice. But he remained essentially a transitional figure. His ideas set loose continuing reverberations over time which he himself could not have imagined. Locke proclaimed the rights of individuals, but hardly in the sense in which they have come to be proclaimed in the industrial capitalist world, or in the anonymity of great cities, or in the traditions of self-expression associated with names like Rousseau. His freedom of

conscience is a freedom to walk humbly in the service of God, a freedom of churchgoers, not a freedom to assault all the prevailing orthodoxies. His free individual is not a mobile worker nor a man seizing the main chance to push himself up in the world, but a person with a place, name, and station in a familiar community. He recognized the rights and benefits of economic self-aggrandizement but always subject to the duties of Christian brotherhood.

In brief, he assumed a world in which individuals had more choices with respect to the social groups within which they would live their lives than they had had in the past, but in which these historical and hereditary groups, with their established patterns, ranks, and mutual obligations, still formed the essential containers of human personality and aspiration. One lived in a contractual relation—a relation of consent, agreement, and quid pro quo—to the political society. In trade and commerce, too, contract ruled, subject to the limits of Christian principle. But in relation to family, local community, and the whole range of everyday duties and associations imposed by birth and heritage, one did simply what God in His wisdom had set one to do. The relations were relations of status, not contract. They were the rights and duties ascribed to one, and not the products of choice or of what we earn through our merits. Contract was the model for politics and economics; status governed elsewhere, with some understood exceptions.

How far our society has moved from Locke's may be indicated—albeit with a bit of overstatement—by suggesting that we have more or less reversed these relationships. In our intimate associations, we live by contract. Marriages are made and dissolved; people regularly change their places of residence; they take one job, then another; they try on their religions and philosophies, and take them off, as though they were trying new styles in clothes. The State and its laws, in recompense, have been forced to step into the breach. In our relations to it, status governs increasingly. The law tells us that if we are to be employed in certain occupations, we must be represented by a collective bargaining agent. If we are members of minorities, or old people, or widows, or dependent children, or consumers, or tenants, and so on, we have ascribed rights incident to these stations. As our society has grown in size and as individuals have found themselves in a more fluid system of associations, the law has intervened to protect the weak against the strong and to provide some system of security and predictability.

Locke, though he foresaw little or nothing of this, nevertheless gives a presentiment of it in the basic inconsistency that runs through his entire political outlook. On one side of his philosophy, Locke leaped back, across the chasm of the British Civil War that had produced Hobbes, to medieval sources and to Richard Hooker—"the judicious Hooker," as Locke called him—the 16th century English philosopher of

ecclesiastic politics who was the last great spokesman for the medieval tradition. From Hooker and from medieval thought Locke derived his belief in preexisting communal codes and a transcendent Natural Law through which God defines man's social functions and imposes obligations upon him. And yet there is also a Hobbesian individualism in Locke's arguments. When, at the beginning of his *Second Treatise*, he quotes "the judicious Hooker" on the rationale for being just and charitable, he chooses a passage which makes justice and charity look like a calculation or bargain between individuals: "If I do harm, I must look to suffer, there being no reason that others should show greater measure of love to me than they have by me showed to them."[63]

In Locke's concept of individual natural rights, the relation of individual right to the individual's obligation to carry out God's purposes is unmistakable. But in his metaphysics he has performed a characteristic Puritan-Protestant act of amputation. He has severed the relationship of the individual to God from the framework of organization and hierarchy through which the medieval world had sought to mediate the relationship of the individual and his Maker. Individuals stand alone, in direct relation to their Judge. That image of the individual affects Locke's concept of natural rights. The individual is endowed with those rights independently of his place and function in any particular society. They are not functional rights associated with man's social functions. They are rights of the socially naked individual which he brings with him into society.

In consequence, there is a tension in the Lockean tradition, and in our contemporary jurisprudence of liberty, between two kinds of rights and liberties—the rights and liberties of the individual and the rights and liberties of social groups to maintain the communal life they desire. It is the classic question which Benjamin Constant phrased as the conflict between "the liberty of the ancients"—political liberty, the right to participate in the public power and enforce the collective will—and "the liberty of the moderns"—"the peaceful enjoyment of private independence" and the "guarantees afforded by institutions to these enjoyments."[64]

That tension was increased in John Stuart Mill's philosophy. He was a Victorian dissenter who lived, in public, a life at odds with the regnant notions of respectability in polite society, and who made no effort to hide his heterodox religious views. His overwhelming concern was to articulate and defend "the liberties of the moderns"—the rights of individuals to their zones of privacy and individuality against the

[63] J. Locke, The Second Treatise of Government ¶ 5, at 5 (T. Peardon 1952).

[64] Constant, *De La Liberte Des Anciens Comparee A Celle Des Modernes*, in Oeuvres Politiques 268-69 (C. Lovandre ed. 1874).

pressures of any and every social group. We owe to him as much as to any single individual our legal system's present concern with the rights of the individual as against the group, and I hope I have made it clear that I, for one, feel considerable gratitude to him for what he accomplished. But no new liberties are won without upsetting the balance among liberties. The liberties for individuals for which Mill fought raise questions about the function and scope of other liberties, particularly communal liberties. What I wish to ask is whether there are liberties—"the liberties of the ancients," the liberties of men in their capacities as members of groups to make laws for themselves without outside interference—to which our contemporary jurisprudence should give more attention. In discussing this question I am choosing only one among many to which in this final essay I might give attention, but it seems to me to raise a crucial and representative issue with respect to a theory of liberty applicable to our present discontents.

It might be said to be, indeed, the encompassing question in American political life—the question of the One and the Many. The demand for liberty, as I have suggested, is associated with a recognition of the inevitability of diversity and of its social utility and attractions. It grows out of a sense that human life is various, that ironclad rules meant to embrace and contain all individual circumstances are bound to be either cruel or inept, and that the distribution in society of authority to exercise discretion and to cut standards to the shape of local and special cases is by far the preferable policy—probably more efficient from the standpoint of administering the laws, and certainly more humane. But a paradox arises in the pursuit of this purpose. Diversity has to be protected, sometimes by rules, and sometimes by rules that are constitutional in dimension. But such rules, though they make the law more responsive to individual differences in certain ways, can also make it less responsive in other ways. They are concerned with one kind of diversity—the right of the individual to deviate from the group's norms—and not with another—the permissible diversity between groups. And the price for pushing the first without attention to the second is the acceleration of the tendencies already working in our society towards the homogenization of life and the weakening of communal bonds.

Shall we guarantee the rights of individuals more and more firmly, in more and more detail, and in more and more domains, and thus move ever further towards national, homogeneous, uniform standards? Or shall we concern ourselves about the kinds of diversity which individuals can enjoy only if the local, heterogeneous groups and collectivities within which they live and work enjoy autonomy and the chance to do things their own way? No solution entirely on one side or the other will be satisfactory. But it is desirable to be aware of the fact that the tension between the One and the Many, the national and the local, is not a

tension between liberty pure, simple, and beautiful on one side and something else which is not liberty. It is a tension between different liberties, between different claims to be allowed to live and act in accordance with one's own choice rather than under the direction of others. If liberty is to be sustained by a sense that it does indeed give citizens important controls over the shape of their lives, then more attention will have to be given, I believe, to what I call communal liberties.

B. Communal Liberties

I am going to consider some decisions of our courts which illustrate these issues. Before doing so, however, I must enter certain demurrers, for it would be very easy to be misunderstood in what I am about to say.

One of the most conspicuous ways in which the demand for communal freedoms has shown itself in the last decade has been in the revival of ethnic loyalties. I have considerable sympathy for people who wish genuinely to live their own lives and to associate with those with whom they feel most comfortable. Certainly if the United States cannot provide that freedom it has annihilated liberty in one of its simplest and most powerful forms. But at the danger of revealing a sour side of myself, I have little sympathy for "ethnicity" as a philosophy. It seems to me too often to confuse the primitive and irrational—the suspicion of words and logic and science and of a cosmopolitan outlook—for cultural authenticity. It seems to me an assertion, too often, of sectarian values as against the values of mutual understanding and general human compassion. It seems to me, not least, to rest on the extraordinary proposition that the way to bring peace to our many-sided country is to adopt the formula of ethnic separatism and rivalry which has worked with such conspicuous success in the Balkans.

It may be, as some very astute observers believe, that ethnic assertiveness is here to stay for quite a while, and that "there is a phenomenon here that is, in ways not yet explicated, no mere survival but intimately and organically bound up with major trends of modern societies."[65] If this is the case I shall not go into mourning, but I'm not going to break out the flags either. The concern for pluralism that I am going to express is not to be confused with enthusiasm for the renewal of petty nationalisms—or grandiose ones either. My own preference is for the melting pot. I like a bouillabaisse in which the original ingredients retain something of their identifiable shape and flavor but all contribute to one another.

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[65] Glazer & Moynihan, *Why Ethnicity*? in COMMENTARY, Vol. 58, No. 4 (October, 1974), at 39.

Similarly, I would not wish to be misunderstood as denying the primacy of certain fundamental individual rights. That an individual should not be humiliated on grounds of color or denied full access to public facilities or the public life seems to me to be basic, and not overridable on grounds of local autonomy. The problem I am going to discuss has to do with the balance between fundamental rights and local autonomies, between universal prescriptions and individual variations, that reasonable men might wish to strike. But I am not arguing for abolishing the principle of fundamental individual rights.

As a final word, let me say that I make no pretence to discussing the issues as matter of constitutional law. I am not a lawyer, let alone a constitutional lawyer. My hope is to try to outline some of the jurisprudential issues that seem to me to be pertinent.

C. Community Norms vs. Individual Lifestyles

In the Spring of 1974, there came before the Supreme Court the case of Belle Terre, a village on Long Island with a population of 700, which has a zoning ordinance restricting all residences to one-family dwellings. "Family" is defined in the ordinance as follows:

> One or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.[66]

This is a moderately latitudinarian definition of a family. Yet it was insufficient to keep Belle Terre out of the courts for interfering with individual freedom. A house in Belle Terre was leased to a group of six young men and women who were students at the State University of New York in Stony Brook, not far away. When the village served the landlord with an "Order to Remedy Violations" three of his tenants brought action for an injunction to declare the zoning ordinance unconstitutional. The District Court so held, and the Court of Appeals affirmed. Belle Terre took the case to the Supreme Court.

The majority opinion of the Court was written by Mr. Justice Douglas. He held that Belle Terre was within its rights. Recognizing that some troublesome issues had been said to be germane to the case, Justice Douglas set them aside. The challenge to the constitutionality of the ordinance had been on several grounds: that it interfered with individuals' right to travel, to migrate, or to settle within a state; that it barred people who were uncongenial to the existing residents; that it expressed

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[66] Village of Belle Terre v. Boraas, 416 U.S. 1, 2 (1974).

the social preferences of the residents for groups congenial to them; that social homogeneity is not a legitimate interest of government; that restricting those whom the neighbors do not like trenches on the newcomers' right of privacy; that it is no rightful concern of villagers whether the residents are married or unmarried; that the ordinance was antithetical to the American experience, ideology, and self-perception as an open, egalitarian, and integrated society.[67] These are not arguments to which Justice Douglas has been insensitive. In his judgment, however, they were not pertinent to the case at hand.

The zoning ordinance, he declared, was not aimed at transients, nor did it involve procedural disparities imposed on some but not on others. As to the argument that it reeked of animosity towards cohabitation sans marriage, the definition of the family in the zoning ordinance itself, according to Justice Douglas, provided a refutation. To be sure, the ordinance did draw the line at two people whether of the same or different sexes. It said that more than two was out of bounds. But this was not an unwarranted intrusion on private lifestyles. Lines have to be drawn somewhere, and nothing in the ordinance showed that Belle Terre had drawn the line in order to impose its conception of morality in sexual relations on unconsenting individuals. It had merely taken steps to protect itself against the evils that boarding houses and fraternity houses present—purely physical evils, like crowding, traffic, parking problems, noise. This is surely a minimum objective, compatible with the government of a society in which people have private rights. The ordinance had a rational relation to the accomplishment of a legitimate public purpose. At this point Justice Douglas warmed to the subject:

> The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[68]

Mr. Justice Marshall, however, was unpersuaded. The ordinance, he dissented, discriminated

> on the basis of . . . a personal lifestyle choice as to household companions, [and imposed] upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood and marriage, and compose the established order within the community.[69]

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[67] *Id.* at 7.
[68] *Id.* at 9.
[69] *Id.* at 16.

It ought to have been struck down, in his view, because it impinged upon fundamental personal rights. Nor could it be justified on the ground that it served to control population density, traffic, the rent structure of the community, or its attractiveness to families. While these are legitimate interests for whose protection government and law may be called upon, the ordinance under dispute used means both overinclusive and underinclusive to protect them. As Justice Marshall pointed out, "While an extended family of a dozen or more might live in a small bungalow, three elderly and retired persons could not occupy the large manor house next door."[70] An ordinance saying nothing about marriage or family would have been perfectly capable, in his view, of attaining the stated and legitimate objectives which the majority of the Court had invoked to sustain the ordinance in question.

Now what arrests my attention in this disagreement between Justices Douglas and Marshall is, most of all, the point on which they appear to be agreed. They assume that it is no business of government within our constitutional tradition to impose community norms on individual lifestyles. This, I know, is a commonplace of jurisprudential discussion in the liberal tradition, and I should not like to think of myself as outside that tradition, but I find the doctrine, at least as it is usually stated, an inherently implausible one. I shall not discuss at length the obvious example of society's imposing a community norm on Charles Manson's lifestyle. But society imposes the model of monogamy on those who wish to be married; it treats assault as a crime whether or not the action is part of a pattern of behavior between two consenting adults; it does not permit a voluntary contract to enter a condition of slavery; and I am not aware of a strong disposition in any circles to eliminate such laws on the ground that they impose community norms on individual life-styles.[71]

Moreover, the law, apart from the direct sanctions imposed by criminal codes, shows its preference for certain styles of life over others in myriad ways. It does not enforce wagering contracts or contracts never to marry; its tax codes favor the milk drinker over the whiskey drinker, and the churchgoer over the baseball fan. But the most immediately persuasive evidence that the law does indeed make moral distinctions, and that it is difficult to maintain the consistent position that it should not, is in the language of Justice Douglas' opinion itself. In support of his opinion, he invokes the Court's decision in *Berman v. Parker*[72] and quotes from its supporting opinion at length:

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[70] *Id.* at 19.

[71] For further examples and a fuller discussion, see P. DEVLIN, THE ENFORCEMENT OF MORALS (1965); see also the reply to Devlin by H. HART, LAW, LIBERTY AND MORALITY (1963).

[72] 348 U.S. 26 (1954).

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced, as well as carefully patrolled.[73]

Though I may be attesting only to a peculiar blindness on my part, I find it hard to sever conceptions of the "beautiful" or the "well-balanced" in housing projects from considerations involving some reference to moral standards and attractive lifestyles.

The argument is even clearer, I suggest, when we turn to Justice Douglas' language about *Belle Terre* itself. He invokes "family values, youth values, and the blessings of quiet seclusion and clean air." Has he not here conceded what he has earlier denied in his desire to show that the zoning ordinance did not impose social homogeneity? "The blessings of quiet seclusion": I am a New Yorker, and I grew up with scores of people who regarded quiet seclusion as what happens to people who commit crimes. "Make the area a sanctuary for people": but from what? There are people for whom the smell of gasoline is redolent of everything they like, and who think it intrinsic to the only lifestyle they enjoy.

The cat slips out of the bag entirely when we turn to Justice Douglas' other phrases. He speaks of "youth values" and "family values." Plainly, he is not speaking of the values of the six young people who, by his decision, must remove themselves from Belle Terre. He is evoking certain notions of the conditions proper to the rearing of the young. The case is even plainer with regard to "family values." What is being asserted is that there are some ideals held by some people in society which the courts may properly take to be ideals for the society, norms with respect to which legislation may be written and judges make their decisions. Because they are *ideals* they naturally conflict with at least some people's actions, and, in a heterogeneous society, with some people's personal convictions. Nevertheless, the police power is not beyond its proper bounds in enforcing them. This, so far as I can see, is the fully expressed logic of *Belle Terre*.

To be sure, this may seem to support Justice Marshall's dissent in the case. It might seem to follow that the law should not get into such matters at all. But we can come to this conclusion only if we can coherently conceive the possibility of a morally neutral legal system. In *Stanley v. Georgia*,[74] to which Justice Marshall refers, the Court as-

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[73] *Id.* at 32-33.

[74] 394 U.S. 557, 565 (1969).

serted the constitutionally protected liberty of the individual "to satisfy his intellectual and emotional needs in the privacy of his own home." Like any other principle, however, this is one obviously subject to limitations. No one supposes it includes the right to maintain fire hazards, no matter how essential to the individual's psychic needs. Why is the presence of people living in a style, however quietly, which one believes morally wrong and not proper for one's children's eyes not also a hazard? If one says that it is a question of the degree of the danger, that surely is a moral judgment. The fires of hell burn more harshly in some people's minds than the fires of this earth. And if one says that it is a question of the proximity and probability of the danger, that, too, is a moral judgment. The close dangers of legal intervention and public supervision are taken to outweigh the more distant danger of moral corruption. The judgment may be correct, but that does not mean it is not a moral judgment. In brief, the concept of a morally neutral legal system seems to me not to withstand close scrutiny.

D. Judicial Neutrality and Community Value Judgments

Other cases dealing with rather different matters further illustrate the difficulties of a jurisprudence of liberty which asks of the legal system that it be neutral with regard to moral controversies in the community. In *Braunfeld v. Brown*[75] the Supreme Court upheld the criminal conviction of a man who for religious reasons closed his store on Saturdays but did business on Sundays. In *Sherbert v. Verner*[76] the Court, in contrast, upheld the complaint of the Seventh Day Adventist who had been discharged from her job for refusing to work on Saturdays, and who was then denied unemployment compensation by South Carolina for refusing to accept alternative employment also requiring her to work on Saturdays. Mr. Justice Brennan, writing for the Court, held that South Carolina had imposed a heavy and unconstitutional burden on the plaintiff's free exercise of religion and that no compelling state interest had been produced in justification. The precedent of *Braunfeld*, he maintained, did not apply because in that case a strong state interest in providing one uniform day of rest for all workers was present, whereas with respect to eligibility for unemployment compensation the problem could be solved by writing statutes permitting exceptions for Saturday sabbatarians.

Not everyone on the Court was happy with this reasoning. Justice Harlan, in his dissent,[77] pointed out that people who claimed a Saturday

[75] 366 U.S. 599 (1963).
[76] 374 U.S. 398 (1963).
[77] *Id.* at 418.

sabbath could escape the South Carolina law's strictures, but not, for example, people with compulsions to watch television on Saturdays. Was not the Court moving towards the establishment of religion? As for Justice Stewart, it was his belief that the Court was right in *Sherbert* but wrong in *Braunfeld*.[78] Surely a criminal conviction was an even heavier burden on the free exercise of Braunfeld's faith than denial of unemployment benefits was for Sherbert. Happily for myself, I am not in a position which requires me to untie these knots. In the terms offered the problem is not one to which I can begin to see a sharply marked answer, and the language of the Constitution does not seem to help. The first amendment proscribes all laws respecting the establishment of religion, but it also proscribes laws affecting the free exercise of religion. If statutes are written making exceptions for religious groups that are incidentally burdened, the state can be accused of disregarding the establishment clause. If, on the other hand, such indirect burdens are permitted, it can be accused of infringing on the free exercise of religion. The ambiguity of the Constitution on this matter is not on the whole, however, a handicap. It permits lawmakers and citizens to engage in the weighing and balancing of the values in specific cases, which is preferable, in my view, to the categorical determination, on the one hand, to ignore the claims of minorities, or, on the other, to eviscerate the legislative powers of the community by multiplying minority vetoes.

A classic combination of cases illustrative of these dilemmas is *Prince v. Massachusetts*[79] and *Wisconsin v. Yoder*.[80] Mrs. Prince, a member of the Jehovah's Witnesses sect, was convicted of violating the child labor laws of Massachusetts for sending her 9-year-old niece out on the streets to sell religious magazines. The girl did this enthusiastically and gave testimony that she believed she was performing her religious duty, but this testimony was excluded by the trial court. The Supreme Court upheld Mrs. Prince's conviction, holding that the infringement on religious freedom was slight, since other means of religious indoctrination were available, and that the state had a clear authority to protect minors which was sufficient, where the dangers were severe, to override parental authority. In *Yoder*, by way of contrast, the Supreme Court took the side of a religious sect. Yoder and associated appellants were members of the Amish sect who refused on religious grounds to send their children to high schools and had therefore been found in violation of Wisconsin's compulsory education laws. The Court sustained their appeal against the conviction, holding that the infringement on their religious beliefs was severe and that the Amish presented

[78] *Id.* at 413.
[79] 321 U.S. 158 (1944).
[80] 406 U.S. 205 (1971).

a reasonable alternative method of meeting the legitimate objectives of Wisconsin's education law.

Putting *Prince* and *Yoder* together, interesting questions arise. Is depriving children of a secular high school education less of a harm to them than requiring them to sell magazines on the streets? Is it less harm to society? On what basis are child labor laws held to represent a more compelling state interest than compulsory education laws? And why has the Court in *Prince* affirmed the secular rights of the individual child against the parental sect but in *Yoder* affirmed the rights of the sect against the child? For has not the child a legally recognized interest in being educated? And has not Wisconsin, through its laws and through the funds it has appropriated, indicated what it thinks to be a minimally decent education for its children? These questions are raised by Professor Philip B. Kurland, who professes himself bewildered by the Court's behavior, and indicates his own agreement with Justice Douglas' opinion that the emphasis should have been given to the rights of individual children rather than to those of the Amish sect.[81]

I do not believe that I agree either with Professor Kurland or Justice Douglas. I am hesitant to comment on the law in the case, but speaking as a layman, and considering the question as one in social and moral policy, I would offer the following answer to the question why state intervention is justified in *Prince* but not in *Yoder*. It would seem to me that the Court in *Prince* acted on what is now the almost universally accepted moral principle that child labor is prima facie suspect, and that state intervention even against parents is justified when child labor is involved. By contrast, in *Yoder* the Court was faced by an ambiguous condition in the mores, both at the level of popular belief and at the level of sophisticated and conscientious reflection. The opinion is widespread in our society that children should be educated at least until the age of 16. But disagreements as to what is a proper and effective education—whether it should be in the classroom or outside, whether it should be academic for all or vocational or highly individualized, or religious or secular, or "cognitive" or "affective"—are rife both in the teaching profession and the community at large. In these circumstances, the Amish provide simply one more system of education, and one worth permitting if for no other reason than its useful demonstration purposes. Moreover, the family as an institution is also a value to be preserved. Short of showing that the family life of the Amish represents an incursion on deep and widely shared moral principles held almost everywhere in the nation, state incursion on the authority of the family in this case would seem to me unjustified.

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[81] Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 240-41 (1973).

Clearly, such determinations rest on the assumption that the law may favor certain institutions and, by implication, disfavor others. But a straightforward acceptance of this principle seems to me preferable to tortured efforts to reason around it. The law may cease taking the sides it does with regard to particular issues, but it cannot cease taking some side. To ease the abortion laws may seem morally neutral because it does not require any individual with conscientious scruples against abortion to receive an abortion. But it changes the effective scale of values in society. It gives new power to one set of moral norms and reduces the power and influence of the other. Each time that a court takes action, even in the name of the individual's right to be different, it legislates not simply for liberty but for a new balance among moral norms. Liberty is always limited by considerations, spoken or unspoken, of what is morally legitimate. When actions are permitted that have hitherto been prohibited, the circle of legitimacy changes.

E. Individual Moral Variations and Community Standards

Let us go back to the fundamental issue. Am I arguing that there is no reasonable basis for the proposition that the law should be reluctant to enforce moral standards? I am, I hope, arguing something less and something more than that categorical position. From the point of view of a concern with liberty, there are the gravest dangers, in a heterogeneous and rapidly changing society, in adopting the view that one man in a black robe, or three, or nine, should lay down the principles of right and wrong for all people's private lives. Where there is considerable dissensus in the nation, when thoughtful and conscientious people disagree, the imposition of uniform norms backed by legal sanctions seems to me imprudent as a practical matter and incompatible as a matter of principle with the diversities desirable in a free society. But we do not have in all respects—it must be evident—a single national community divided equally in all its parts over certain basic moral issues. There are regions and localities where a consensus exists, even though that consensus differs radically from the consensus elsewhere. If we are concerned about liberty—and about the values of diversity, individual variation, and personal enterprise—then the substitute, in a heterogeneous, continental nation, for the fantasy of avoiding moral legislation is the pluralizing of this legislation. Where substantial disagreements about morality exist the law can be neutral at the constitutional level. It can, that is to say, permit and encourage moral variation.

To take the example of *Belle Terre*,[82] I do not think I would be quite

[82] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

as content with the result there reached by the Supreme Court if I thought that the students in question could find no other place to live. There is a protection for individual diversity, in many contexts, which is other than the insistence on the individual's rights as against the community in which he finds himself. It is the protection of offering him an option, an opportunity to place himself in another community. People who deviate from the standards of a community cannot expect to be protected from every inconvenience incident to such deviance—not so long, at any rate, as we give some attention to the claim of other people to be permitted to exercise some control over matters close at hand which they consider vital. What a free society can offer those who deviate—what it must offer—is simply a reasonable opportunity to find settings for themselves where they can lead the lives they wish without paying an insupportable price.

On matters of the morality of competing lifestyles reasonable men, within broad limits, can and do reasonably disagree. This is particularly the case with regard to sexual morality and personal lifestyles. The issues are intricate, and people come down where they do more in consequence of their inarticulate hopes and fears than in consequence of propositions for which they can marshal compelling evidence. It is hard indeed to say in many cases who is reasonable and who is not. In the circumstances, it seems to me sensible to follow Justice Holmes' advice to have not one law but several. We need not be dissuaded from such a course by the argument that we are permitting communities to shut off individuals from access to what is different. We have a national press, national television, national advertising, and nationally shown films, and we have easy means of transportation. The flow of ideas and the competition of lifestyles will not be seriously impeded. On the contrary, I should think the competition might be aided.

F. Political and Communal Liberties Today

Let me come back to the issues presented by Watergate—the thrust for power of a small group careless of the laws and the Constitution and the insufficiency of public-spirited citizens who are prepared to participate actively in the public life. Do these problems not have something to do with the sense, existing in so many places in our society, that there is no way of taking a grip on events—that every problem is an outsize one, that the scale of things is too large, that the vetoes are too numerous, that rarely can people working together put their stamp on what happens, that the edicts will come from a great distance away and impose a helpless uniformity on the outcome? It seems to me an imprudent policy for the courts, however unwittingly, to assist the trends that are pushing towards this condition of national homogeneity and frustration.

I do not put the blame, in the first instance, on the courts. The failures of our legislatures and of Congress are legion, and the courts have too often been forced to act because the political processes have not worked. Nevertheless, there is such a thing as a *Zeitgeist*—an inclination in the movement of ideas to which judges, like other human beings, succumb because the alternatives have been suppressed from consciousness. In our contemporary jurisprudence of liberty we would do well to reconsider, I suggest, the values of the political and communal liberties. The belief that one can maintain one's own distinctive terrain, the conviction, based on a successful experience, that political activity actually leads to the shaping of one's immediate environment at least to some extent as one would desire, is a condition, I believe, for a revitalization of our institutions not only at the local but also at the national levels.

Liberties lose their savor when they come only to represent rights to be vindicated in the courts or by appeal to administrative agencies. The attachment of the people to their liberties becomes attenuated when they think of them only as protections for individuals, standing alone, against the excesses of other individuals or of the political processes of society. They take on life when they are tickets of access to genuine power, when they give people the chance to control things close at hand, and to join with others in the enterprises of visible and active communities. It will be odd if the jurisprudence of individual rights descended from Locke ends in Hobbes' antipathy to the division of sovereignty and in his elevation of the One over the Many. It will be odd if, in the name of liberty, the laws and the fashions make us the same from one end of this continental nation to the other. A jurisprudence of liberty is needed which will seek, within the framework of national standards of individual liberty, to enlarge the powers and autonomies of local communities, and their opportunities, accordingly, to rehearse divergent conceptions of a decent life. For it is in such heterogeneities that we find the mark and fruit of a free and vital civic life.